

VOLUME: 7
PAGES: 222-431

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 DISTRICT OF VERMONT

4 Misty Blanchette Porter)
5)
6 v.) Case No. 2:17-cv-194
7)
8 Dartmouth-Hitchcock)
9)
10)
11)
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

RE: Day 7 of Jury Trial

DATE: April 1, 2025

LOCATION: Burlington, Vermont

BEFORE: Honorable Kevin J. Doyle
Magistrate Judge

APPEARANCES:

Geoffrey J. Vitt, Esq.
Sarah H. Nunan, Esq.
Vitt & Nunan, PLC
8 Beaver Meadow Road
Norwich, VT 05055

Eric D. Jones, Esq.
Langrock, Sperry & Wool
210 College Street, Suite 400
Burlington, VT 05410

Donald W. Schroeder, Esq.
Morgan McDonald, Esq.
Foley & Lardner, LLP
111 Huntington Avenue, Suite 2500
Boston, MA 02199

- Continued on Next Page -

VOLUME: 7
PAGES: 222-431

1 Tristram J. Coffin, Esq.
2 Downs Rachlin Martin, PLLC
3 199 Main Street, Suite 600
4 Burlington, VT 05401-8339

5
6 TRANSCRIBED BY: Sunnie Elizabeth Donath, RMR
7 United States District Court Reporter
verbatim@vermontel.net

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

VOLUME: 7
PAGES: 222-431

1

INDEX OF EXAMINATION

	<u>Witness</u>	<u>Examined By</u>	<u>Page</u>	<u>Line</u>
3	Leslie DeMars	Atty. Nunan Atty. Schroeder Atty. Nunan Atty. Schroeder	227 260 332 344	11 23 22 7
6	Michelle Russell	Atty. Nunan Atty. Schroeder	356 374	5 6
8	Joanne Conroy	Atty. Vitt	381	24
9	Ira Bernstein	Atty. Vitt Atty. McDonald	404 416	8 17

10

11

12

INDEX OF EXHIBITS

		<u>Page</u>	<u>Admitted</u>
14	<u>Plaintiff Exhibits</u>		
15	12	228	Y
16	13	231	Y
17	18	249	Y
18	23	250	Y
19	25	254	Y
	64	330	Y
18	109	256	Y
	110	256	Y
19	129	299	Y

20

21

Defense Exhibits

22	Z	306	Y
23	A4	310	Y
	B1	314	Y
24	G	326	Y

25

* * * * *

VOLUME: 7
PAGES: 222-431

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 (The trial began at 9:02 a.m.)

2 THE COURT: Okay. Good morning. Anything to take up
3 before we get the jury?

4 ATTORNEY SCHROEDER: Nothing, Your Honor.

THE COURT: Okay. Plaintiff, nothing?

6 ATTORNEY JONES: Nothing

7 THE COURT: Okay. Please get jury.

8 ATTORNEY SCHROEDER: Should I go get the Witness?

9 THE COURT: Yes, please.

10 ATTORNEY SCHROEDER: Okay.

11 (The Jury enters the courtroom.)

19 THE COURT: Okay. Good morning, members of the jury.
20 I'll begin with the usual question. Has anyone spoken to you
21 about this case since yesterday, or have you learned any
22 information about the case from outside the courtroom since
23 yesterday? Okay. Seeing no hands raised, Ms. Nunan. So I'll
24 ask the deputy clerk to swear in Dr. DeMars again for today.

25

4 ATTORNEY NUNAN: I'm going to put Exhibit Number 9
5 up. It has been admitted.

6 ATTORNEY SCHROEDER: Is that defendant's or
7 plaintiff?

8 ATTORNEY NUNAN: Plaintiff.

9 ATTORNEY SCHROEDER: Oh.

10 ATTORNEY NUNAN: Number 9.

11 DIRECT EXAMINATION BY ATTORNEY NUNAN

12 Q. Good morning, Dr. DeMars.

13 A. Good morning.

14 Q. We left off yesterday on Exhibit Number 9. I just want to
15 confirm with you that, despite this understanding that Dr.
16 Seifer was clinically incompetent in July of 2016, you took no
17 action to restrict his IVF procedures on patients that summer;
18 is that right?

19 A. That's not the case.

20 Q. I'd like to turn to Document Number 12, Exhibit,
21 Plaintiff's Exhibit Number 12.

22 A. Yes.

23 O. This is an email to you from Elizabeth Todd --

24 A. Yes.

25 Q. -- dated September 11th 2016?

1 A. Yes.

2 ATTORNEY NUNAN: I'd like to move for the admission
3 of Plaintiff's Exhibit 12, please.

4 THE COURT: Any objection?

5 ATTORNEY SCHROEDER: No objection.

6 THE COURT: Okay. Plaintiff's Exhibit 12 is
7 admitted.

8 (Plaintiff Exhibit 12 is admitted into evidence.)

9 BY ATTORNEY NUNAN:

10 Q. Okay. Here's the top of the exhibit. I'd like you to
11 look at the bottom. You mentioned yesterday that there was a
12 requirement for an FPPE assessment of Dr. Seifer; is that
13 correct?

14 A. Yes.

15 Q. Okay. And in September did you reach out to the members
16 of the REI division to get their feedback on their experiences
17 with Dr. Seifer?

18 A. Yes.

19 Q. That's what's going on here at the bottom of the page?

20 A. Yes.

21 Q. Okay. Remind me again who Elizabeth Todd is.

22 A. Beth Todd was the nurse practitioner for the REI division.

23 Q. And she writes back to you. She says, "I do not feel that
24 I can go to David for consultation collaboration with the
25 noninfertility patients that I see. Misty, Judy, Paul M.,

1 Neil, and even Richard have been a clinical resource to me for
2 a broad scope of patients. This is a very big concern for me,
3 as I see a wide range of patients. I am grateful for Judy,
4 you, Chris, Ivy, Regan, Debbie, Julie, Karen George and Joe
5 Findlay for being gracious resources for me during Misty's
6 absence."

7 That list of names that she puts at the very end, those
8 are -- Joe Findlay is a fellow, correct, in the REI division?

9 A. Joe Findlay was a UVM fellow.

10 Q. Karen George was an OB/GYN?

11 A. Faculty member for OB/GYN.

12 Q. So these are the folks during 2016 that helped run the REI
13 division. She cites it as the noninfertility patients,
14 correct?

15 ATTORNEY SCHROEDER: Objection.

16 THE COURT: Basis?

17 ATTORNEY SCHROEDER: Mischaracterizes her testimony.

18 THE COURT: Okay. Well, you can ask the question of
19 the Witness, and she can clarify.

20 BY ATTORNEY NUNAN:

21 Q. Okay. Beth Todd is referring to noninfertility patients
22 about when she can go to David Seifer; is that correct here in
23 this document?

24 A. Correct.

25 Q. Okay. And she's saying that she was able to get help from

1 these other individuals; is that correct?

2 A. Yes.

3 Q. Okay.

4 A. These would be for general GYN questions.

5 Q. Well, I'm sorry. Beth Todd was in the REI division,
6 correct?

7 A. Yes. She also saw patients, as did Misty, who had GYN
8 problems and not infertility problems.

9 Q. But they would be under the reproductive endocrinology,
10 not the infertility, but under the REI division? There was
11 noninfertility issues, correct?

12 A. There were also nonreproductive endocrine issues seen in
13 REI. There were general gynecology issues seen in the REI
14 division as well.

15 Q. Okay. Did you also solicit input from Misty Porter for
16 this FPPE assessment?

17 A. I solicited from all members of the, of the division.

18 Q. And she was part of the division?

19 A. Yes.

20 Q. Okay, great. I'd like you to turn to Exhibit 13, please.

21 A. Yes.

22 Q. Okay. Give me just a second. I'm having an issue with
23 this document. This is an email that Misty wrote to you on
24 September 12th 2016; is that correct?

25 A. Yes.

VOLUME: 7
PAGES: 222-431

1 ATTORNEY NUNAN: Okay. I would like to move into
2 evidence Plaintiff's Exhibit 13.

3 THE COURT: Any objection?

4 ATTORNEY SCHROEDER: No objection.

5 THE COURT: Okay. Plaintiff's Exhibit 13 is
6 admitted.

7 (Plaintiff Exhibit 13 is admitted into evidence.)

8 BY ATTORNEY NUNAN:

9 Q. Okay. Again, starting at the bottom of Page 2, that's you
10 soliciting information for the -- part of the hiring, part of
11 hiring a new MD is a comprehensive 360 review at 90 days. So
12 you are doing Dr. Seifer's 90-day evaluation, correct?

13 A. Correct.

14 Q. What I've highlighted at the top on the screen, the second
15 paragraph, it says, "Forgive the tardiness as I have been
16 settling in from a long day of travel after recovering from a
17 fairly lengthy surgery".

18 Dr. Porter had gone in August to the Mayo Clinic?

19 A. Yes.

20 Q. And she had, that was the first surgery she had at the
21 Mayo Clinic, and she was returning and writing this email to
22 you, correct, about David Seifer?

23 A. Yes.

24 Q. Okay. In the first paragraph she writes, "It is late, and
25 the review is tomorrow". Is this the review of David Seifer?

VOLUME: 7
PAGES: 222-431

1 What is the review?

2 A. It may have been the due date that I had set.

3 Q. "Yet most of what I would add I have already shared with
4 you over the last several weeks may be colored more strongly by
5 the financial stressors at DHMC".

6 What does she mean, the financial stressors at DHMC?

7 A. In general, DHMC, during this time, was going through a
8 significant scrutiny of their budget. Their overall margin for
9 a nonprofit, a nonprofit hospital isn't technically supposed to
10 make money, but it has to at least not lose money so that it
11 can pay their workers, et cetera. And we were going through
12 some significant budget scrutiny, budget planning, and, if I
13 recall correctly, there were some considerations of reductions
14 in force or, you know, a hospital-wide reduction.

15 Q. Thank you. The REI division was a money-making department
16 within OB/GYN, correct? Division, sorry, not department.

17 A. I'd have to go back and look at the, look at the
18 financials.

19 Q. You don't remember that, in general, the REI division --

20 A. Honestly, I don't. I remember that gynecologic oncology
21 made money for the department. I don't remember whether REI
22 did.

23 Q. Right, okay.

24 THE COURT: So please wait for the question to be
25 finished before you respond. Thank you.

VOLUME: 7
PAGES: 222-431

1 BY ATTORNEY NUNAN:

2 Q. Thank you. Was it your memory that IVF was a money-making
3 procedure for the department?

4 A. Yes.

5 Q. Okay. So you would agree that on September 12th Dr.
6 Porter might be back and maybe even writing from home but she
7 is able to do a comprehensive review at this point?

8 A. No.

9 Q. No?

10 ATTORNEY SCHROEDER: Objection, Your Honor. Calls
11 for speculation.

12 THE COURT: Sustained.

13 BY ATTORNEY NUNAN:

14 Q. This is a two-page assessment of Dr. Seifer by Dr. Porter,
15 is it not?

16 A. It is.

17 Q. Okay. Do you have any reason to believe that Dr. Porter
18 didn't write this on September 12th?

19 A. No.

20 Q. Okay. So was she back in the clinic at this point?

21 A. No.

22 Q. Okay. Working from home?

23 A. No. She was on leave.

24 Q. But you emailed her during this time period?

25 A. I did.

VOLUME: 7
PAGES: 222-431

1 Q. Okay. And it appears that she had the ability to
2 communicate back to you?

3 ATTORNEY SCHROEDER: Objection, Your Honor.

4 THE COURT: Basis?

5 ATTORNEY SCHROEDER: Calling for speculation. I
6 think the document speaks for itself. Calling for speculation
7 as to what we know that the -- may we approach?

8 THE COURT: Sure.

9 (Bench conference begins.)

10 ATTORNEY SCHROEDER: I'm trying not to do a speaking
11 objection because I'm being mindful of the fact that you want
12 to do it as a sidebar as opposed to --

13 THE COURT: No. You can raise objections as long as
14 your objection is, you know, a one- or two-word objection.

15 ATTORNEY SCHROEDER: That's what I've understood.

16 THE COURT: So I'm told by the court reporter I need
17 to bring this closer when I speak, so you're going to see me
18 moving it. Sorry. Go ahead.

19 ATTORNEY SCHROEDER: Sorry. The issue is she sent
20 that on a certain date. I don't know how long she took to
21 write this email. I don't really care. But neither is
22 Dr. DeMars going to know when she actually sent the email and
23 how long it took her to write that email because all we know is
24 when it was sent on a certain date. But we got -- I want this
25 witness off the stand this morning because she was here for one

VOLUME: 7
PAGES: 222-431

1 day, and now we're on the second day, and asking about, like --
2 well, she asked a lot of questions about the emails. I think
3 we've moved on admission very quick, but we've got to get, move
4 this witness along.

5 THE COURT: So is your objection moving the witness
6 along, or do you have an objection? Is the objection that, is
7 the objection that she shouldn't be asking the questions for
8 purposes of efficiency, or is there a problem with the form of
9 the question?

10 ATTORNEY SCHROEDER: The form of the question is
11 asking her to speculate as to, well, and making comments on
12 when she may have sent the email or things of that nature. So
13 that's the specific objection. But what I wanted to raise with
14 the Court is the fact that we need to move this along because
15 this is the second day of vacation that this individual has had
16 to take to be here.

17 THE COURT: Okay. I understand that. But evidence
18 is going to come in, Mr. Schroeder, right?

19 ATTORNEY SCHROEDER: Understood.

20 THE COURT: I'm not going to be curtailing the
21 attorney's opportunity to ask the questions she wants to ask.
22 I'm very sensitive to what you've raised, but there's very
23 little of what I can do when it comes to efforts to curtail her
24 asking questions in the name of efficiency.

25 ATTORNEY SCHROEDER: I understood that, Your Honor,

VOLUME: 7
PAGES: 222-431

1 but the subpoena was for one day. It wasn't for every day
2 thereafter, as it could have been.

3 THE COURT: I understand. So what was the question
4 that you asked?

5 ATTORNEY NUNAN: I asked if she was capable of giving
6 an assessment at that point, whether she was at home or if she
7 -- this is a very relevant point for the next document, you
8 will see.

9 THE COURT: Okay. So the question was just, Do you
10 know when she wrote it or where she was when she wrote it?

11 ATTORNEY NUNAN: She was capable of writing an
12 assessment of David Seifer on September 12th. She was able to
13 do an assessment. She was back from surgery. You'll see in
14 the next document --

15 THE COURT: Okay. But, as to this particular
16 objection that's been raised, so the question of, Is she
17 capable, what do you mean by that?

18 ATTORNEY NUNAN: Okay. So in the next document
19 Dr. DeMars signs a document for Dr. Porter, and what I'm going
20 to hear from her is that Dr. Porter wasn't back and she
21 couldn't sign things or write things or do anything, and I am
22 using that document to show she was perfectly capable of
23 writing an assessment and sending it and speaking on her own.

24 THE COURT: Okay. I mean, asking the Witness to
25 assess whether she's capable of writing, can't you establish

1 that just by the fact that the email was written on a certain
2 date?

3 ATTORNEY NUNAN: Fine, yeah.

4 THE COURT: Does that answer your objections?

5 ATTORNEY SCHROEDER: Yes.

6 THE COURT: Okay. So then the objection is
7 sustained.

8 ATTORNEY NUNAN: Fine. We'll move on, yes.

9 ATTORNEY SCHROEDER: And apologies for speaking over
10 you.

11 THE COURT: Okay. Thank you.

12 (Bench conference ends.)

13 BY ATTORNEY NUNAN:

14 Q. Dr. DeMars, you received this lengthy email from
15 Dr. Porter. I'm going to you read to you from the bottom. She
16 writes, "Technically, he does not appear to be at ease with
17 commonly performed procedures and limited in his ability to
18 work up a couple with infertility, tubal patency assessment.
19 When I observed him doing IVF harvest, it was clear he was
20 struggling with the basics, this basic procedure". Did I read
21 that correctly?

22 A. You did.

23 Q. Okay. On the second page Dr. Porter writes to you, "He
24 orders excessive testing on patients at a considerable expense
25 to the couples, a practice that will quickly encourage couples

1 to seek care elsewhere".

2 Did you understand that was an issue with Dr. Seifer?

3 A. I understand that Dr. Seifer had a different practice
4 pattern than Dr. Porter.

5 Q. Great. I'd like to, I'd like you to look at Document 15,
6 which I believe is already in evidence. Is that correct?

7 THE COURT: So I have Document 15 listed as marked,
8 but not admitted. We're trying to get some clarity on that
9 now.

10 ATTORNEY NUNAN: Yes, please.

11 ATTORNEY SCHROEDER: Your Honor, we have it as
12 admitted.

13 THE COURT: And so does the deputy clerk. Please go
14 ahead.

15 BY ATTORNEY NUNAN:

16 Q. Give me a second while I just -- have you reviewed the
17 document?

18 A. Yes.

19 Q. Good. Please excuse the hiccup. Okay. The cover email
20 is to you. Who is Michelle?

21 A. Michelle Scearbo?

22 Q. Yes.

23 A. She was part of the medical staff office.

24 Q. Got it. And in this email is she writing on behalf --
25 let's see. Is it the credentialing committee, or it's the

1 review committee? What would you call this? I guess the
2 credentialing committee, correct?

3 A. Yes.

4 Q. Okay. So what she says here is, "The progress was
5 reviewed today by Ed Merrens, Maria Padin, and Joyce Chertoff
6 in preparation for bringing the credentials committee, to the
7 credentials committee, and they have a question here for you
8 because you left Number 8 blank"; is that right? It says --

9 A. That's what it says.

10 Q. -- "has the practitioner been subject, the subject of
11 repeated complaints by patients, hospital staff, or members of
12 the medical staff", correct?

13 A. Yes.

14 Q. Okay. So I'd like to take a look at what you have written
15 before we come back to this. You wrote a two-page narrative,
16 right, that I've just scrolled through? Page 2 and 3 is a
17 two-page narrative that you wrote? Dr. DeMars, I'm sorry. Is
18 that a two-page narrative you wrote?

19 A. Yes. I'm sorry. Yes.

20 Q. Okay. I'm going to read what you wrote under "Medical
21 Knowledge". "Most reviewers rated his fund of knowledge as
22 excellent with critics quickly dismissing some of his
23 suggestions as being out of date. He is, in fact, practicing
24 evidence-based specialty care and has advanced the evaluation
25 and management of IVF patients. He has extensive expertise in

1 evaluation of infertility and has an active analytical
2 approach".

3 The email that you received from Dr. Porter did not state
4 this?

5 A. That's correct.

6 Q. The opposite of this, correct?

7 A. That's correct. That is the, that is the only email I
8 received that was critical of Dr. Seifer's medical knowledge.

9 Q. Why didn't you credit Dr. Porter's input here?

10 A. I did with, "Critics quickly dismissing some of his
11 suggestions as being out of date".

12 Q. After the two pages of narrative, on Page 4 this is the
13 initial cover page of the form for the FPP assignment, correct?

14 A. Yes.

15 Q. And, as part of this under "New Applicant", the box has
16 been checked, "Current competence and clinical activity does
17 not meet the guidelines as determined in the FPP policy. Five
18 case reviews will be required within 90 days of initial
19 clinical activity."

20 A. Yes.

21 Q. Okay. So, as part of his assessment because he, he did
22 not meet the guidelines, he had to be proctored, essentially,
23 in five cases?

24 A. Yes.

25 Q. And I just want to draw your attention down here. This

VOLUME: 7
PAGES: 222-431

1 form had to be returned to the medical staff office September
2 12th 2016?

3 A. Correct.

4 Q. On the next page I'd like to call your attention to what
5 you've written here. Can you read your handwriting here for
6 me, please?

7 A. It says, "Approval for unrestricted privileges with
8 planned coaching as Dr. Porter returns to" -- sorry.

9 Q. I'm sorry. At the -- I might not have been clear. At the
10 bottom of that box, you have written Dr. Porter --

11 A. Oh, sorry. "Dr. Porter would like to continue coaching to
12 improve technical skill."

13 Q. And you signed this document on 9/26/16, correct?

14 A. Correct.

15 Q. And can you read what's written right here, your
16 handwriting, approval for?

17 A. "Approval for unrestricted privileges with planned
18 coaching as Dr. Porter returns to maximize technical
19 proficiency."

20 Q. Okay. So the next page says your name has been checked,
21 and you say in handwriting, "See proctoring forms". So we move
22 on to the proctoring forms. So, flipping through the
23 proctoring forms just as an overview, you have Albert Hsu
24 proctoring David Seifer, and in this first one you have Albert
25 Hsu proctoring David Seifer in an embryo transfer, correct?

1 A. Yes.

2 Q. Is that Albert Hsu's signature at the bottom of that page?

3 A. Yes.

4 Q. You have Albert Hsu proctoring David Seifer on 7/20/16 in
5 an oocyte retrieval. That's an egg harvest, correct?

6 A. Yes.

7 Q. And that's Albert Hsu's signature at the bottom, right?

8 A. Yes.

9 Q. He signed that on 9/26. On the next page, you have Albert
10 Hsu proctoring David Seifer in another embryo transfer, and
11 that's his signature at the bottom, right?

12 A. Yes.

13 Q. And in this next document the proctor's name is Misty
14 Blanchette Porter, and it's an oocyte retrieval. So this is an
15 egg harvest?

16 A. Yes.

17 Q. The date of the procedure was 7/20/16 --

18 A. Yes.

19 Q. -- is that correct? Did you fill out this form here?

20 A. Yes.

21 Q. How did you know about the oocyte retrieval on 7/20/16?

22 A. I would have discussed it with Dr. Porter.

23 Q. You didn't go into the medical records to get it?

24 A. I didn't think so, no.

25 Q. Sorry. I'm flipping around here. And so, at the bottom

1 of this document, you sign "DeMars for Blanchette Porter
2 9/26/16".

3 A. Yes, because Dr. Porter was out.

4 Q. She was out? Did she know you were filling out this form?

5 A. Yes.

6 Q. Did she give you permission to sign this form for her?

7 A. I would expect so.

8 Q. Are you sure?

9 A. Am I -- I wouldn't have filled it out without discussing
10 it.

11 Q. Okay. Let's turn to the next page. It says at the very
12 bottom, "See other side".

13 A. Yes.

14 Q. So you've added a whole -- can you please read your
15 writing on this page for us?

16 A. "Dr. Porter is a senior member of the division and has
17 been out on medical leave of absence since 12/15. She returned
18 in July 2016 for very limited clinical duties before going out
19 on full disability again in August 2016. During that time, Dr.
20 Porter observed Dr. Seifer in oocyte retrieval. She observed
21 that he appeared to be unfamiliar with the aspiration pump that
22 DHMC uses. She reviewed the details of the apparatus with him
23 and gave him intraprocedural pointers. The procedure was
24 completed successfully and without complication. Dr. Porter
25 would like to continue to work with Dr. Seifer to refine his

1 technique on this equipment."

2 I completed this form based on written and verbal comments
3 from Dr. Porter. Dr. Porter has been observed to be one of the
4 most technically skilled REI doctors in the region. She is a
5 demanding proctor, as evidenced by her continued work with
6 other division members.

7 Q. You received a highly critical email on July 24th from Dr.
8 Porter after she spent the week watching David Seifer; is that
9 correct?

10 A. After she spent -- I don't know whether it was a week
11 after she, after she spent time watching him do one or two
12 oocyte retrievals.

13 Q. Okay. We looked at that email yesterday --

14 A. Yes.

15 Q. -- Exhibit W.

16 A. Yes.

17 Q. Okay. And that, do you recall in that document at all if
18 she said she was willing to continue to coach him?

19 A. I don't recall.

20 Q. Okay. If I said to you that Dr. Porter did not know that
21 you were filling out this form, would you be surprised?

22 A. I would be.

23 Q. And, if I told you that Dr. Porter said she did not give
24 you permission to sign on her behalf, would you be surprised?

25 A. Yes, I would.

1 Q. Okay. Dr. Porter wrote you a lengthy review on September
2 12th giving her opinions on David Seifer, did she not?

3 A. Yes.

4 Q. Okay. And so she was perfectly capable of filling out a
5 form like this and signing it by herself?

6 ATTORNEY SCHROEDER: Objection.

7 THE COURT: Sustained.

8 BY ATTORNEY NUNAN:

9 Q. So two of those documents you have Albert Hsu observing
10 Dr. Seifer in embryo transfers?

11 A. Yes.

12 Q. Do you recall yesterday we reviewed the June 3rd 2016
13 assessment of Albert Hsu?

14 A. Yes.

15 Q. And, on Page 9 of that document, we looked at Dr. Porter's
16 assessment that he had regressed in his abilities to do embryo
17 transfers?

18 A. Yes, I remember that.

19 Q. Why would he be an appropriate person then to evaluate Dr.
20 Seifer in embryo transfers?

21 A. He was the only person at Dartmouth-Hitchcock who was not
22 on disability, who was not on leave in a position to observe
23 Dr. Seifer. I was trying to understand where on the spectrum
24 of, of ability of Dr. Seifer lay. This was, he just started at
25 Dartmouth. Because of our credentialing procedure, he needed

1 to be observed. The most appropriate people to observe him are
2 those who understand the procedure.

3 Q. I'm sorry. I'm going to interrupt you. You knew when he
4 came on at the beginning of the summer that he needed to have
5 this FPP proctoring evaluation done, correct?

6 A. All new physicians need that done.

7 Q. That's great. So Dr. Porter was in and at least observing
8 him the week -- on Saturday, July 24th, she wrote you an email
9 that said she'd been overseeing him that week. Why didn't you
10 have her fill out all of the proctoring evaluations for him?

11 A. She should have.

12 Q. Okay. Did you ask her to?

13 A. She should have.

14 Q. So this is, this is her responsibility?

15 A. Yes.

16 Q. Is it her responsibility to submit it to the credentialing
17 committee or yours?

18 A. It's hers.

19 Q. You were doing this on behalf of her?

20 A. She was, she was observing for the purpose of proctoring.
21 That form should have been filled out on the day that it was,
22 the observation was performed.

23 Q. Were the Albert Hsu -- so flip to Page 8, please. Albert
24 Hsu was working all of the summer of 2016. This, on Page 8 the
25 oocyte retrieval, Albert Hsu. 7/20/16 was the date of the

VOLUME: 7
PAGES: 222-431

1 procedure. He signed this on 9/26/16. That's not consistent
2 with what you just said.

3 ATTORNEY SCHROEDER: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: I would stand by that statement.

6 BY ATTORNEY NUNAN:

7 Q. Fair. I'm going to turn to Exhibit 16. That's been
8 admitted; is that correct? Will you please turn to Exhibit 16,
9 Dr. DeMars?

10 A. Yes, I have it.

11 Q. This is your response email, is it not?

12 A. Yes, it is.

13 Q. Okay. You state, "Since this was an initial evaluation, I
14 left Number 8 blank".

15 That was the question about whether or not there had been
16 repeated complaints, correct?

17 A. Yes.

18 Q. "Reflecting the positive and negative comments by, n my
19 narrative. Dr. Seifer has not been the subject of repeated
20 complaints by patients, staff, or DH colleagues". You wrote
21 that?

22 A. Yes.

23 Q. Dr. Porter had written you two lengthy critiques of David
24 Seifer, did he not?

25 A. She did.

1 Q. Did she not?

2 A. Yes, she did.

3 Q. And did Sharon Parent meet with you with Casey Dodge in
4 her office to complain about Dr. Seifer?

5 A. Sharon Parent came, and Casey Dodge came as well, to
6 defend Dr. Seifer.

7 Q. It's your testimony that Sharon Parent was defending Dr.
8 Seifer?

9 A. No. Casey was defending Dr. Seifer.

10 Q. Did you hear complaints --

11 THE COURT: Please let the Witness finish her answer
12 before asking the a question.

13 BY ATTORNEY NUNAN:

14 Q. Sorry. Sure. Did you receive complaints from Sharon
15 Parent?

16 A. I received, I received complaints from Sharon. This was
17 reflective of the complaints that there was poor communication.

18 Q. Not of patient pain and harm?

19 A. Not of patient pain and harm.

20 Q. Okay. I would like you to turn to Exhibit 18, please. I
21 do not believe this has been admitted. Did you receive this
22 email from Dr. Porter?

23 A. Yes, I did.

24 Q. February 20th 2017?

25 A. Yes, I did.

1 ATTORNEY NUNAN: I'd like to move for the admission
2 of Plaintiff's Exhibit 18, please.

3 THE COURT: Any objection?

4 ATTORNEY SCHROEDER: No objection, Your Honor.

5 Actually, it may be a duplicate. We can clarify that later.

6 THE COURT: So Plaintiff's Exhibit 18 is admitted.

7 (Plaintiff Exhibit 18 is admitted into evidence.)

8 BY ATTORNEY NUNAN:

9 Q. Okay. I'm having trouble with the exhibits. Please
10 forgive me. So in February of 2017, were you doing a follow-up
11 evaluation of Dr. Seifer?

12 A. Yes.

13 Q. Okay. Did you ask everyone in the REI division to give
14 you feedback on their experience with Dr. Seifer?

15 A. I did.

16 Q. Did Dr. Porter write a response to you?

17 A. She did.

18 Q. Can you remember who else in the department responded to
19 you during this time period?

20 A. I think I got responses from everyone in the department.
21 In the division, excuse me, not the department.

22 Q. Okay. And were they largely negative?

23 A. No.

24 Q. Were a majority of them negative?

25 A. No.

1 Q. Would you classify Dr. Porter's review of Dr. Seifer as
2 negative?

3 A. I would.

4 Q. I would like you to turn to Exhibit 23, please. Okay.
5 This is an email you received from Judith McBean?

6 A. Yes.

7 Q. February 22nd 2017?

8 A. Yes.

9 Q. As part of that review?

10 A. Yes.

11 ATTORNEY NUNAN: I'd like to move for the admission
12 of Exhibit 23?

13 THE COURT: Any objection?

14 ATTORNEY SCHROEDER: No objection.

15 THE COURT: Plaintiff's Exhibit 23 is admitted.

16 (Plaintiff Exhibit 23 is admitted into evidence.)

17 BY ATTORNEY NUNAN:

18 Q. Dr. McBean -- excuse me. All right. Give me just a
19 second, please. I apologize.

20 THE COURT: Yes.

21 BY ATTORNEY NUNAN:

22 Q. Dr. McBean writes a lengthy email to you reviewing her
23 beliefs about David Seifer's technical skills, correct?

24 A. Yes.

25 Q. His standard of care?

1 A. Yes.

2 Q. And his leadership?

3 A. Yes.

4 Q. Would you qualify this or would you describe this document
5 as negative?

6 A. Yes.

7 Q. On the second page she writes about David Seifer, "One of
8 my biggest concerns that I have is with regard to his
9 management of Albert Hsu. Albert does not have an adequate
10 skill set with regard to surgery and patient care. He
11 regularly practices outside of ASRM standards with regards to
12 IVF which is both ineffective and costly to patients. His
13 surgical skills endanger patients. Dr. Seifer has not
14 addressed this issue, and there has been no improvement in his
15 practice."

16 Was this alarming to you?

17 A. This was actually something we were addressing that
18 Dr. McBean was not aware of.

19 Q. You received notice, an eleven-page document in June of
20 2016, seven months before this email was written to you,
21 correct?

22 A. Yes.

23 Q. Albert Hsu had been able to continue since that time
24 performing egg harvests and embryo transfers on patients,
25 correct?

1 A. Yes.

2 Q. No restrictions?

3 A. Dr. Porter had trained him and had completed his approval
4 of being able to do those procedures without restriction.

5 Q. Was she telling you in June of 2016 that he should not be
6 performing these procedures?

7 A. She, she said that his skills had regressed.

8 Q. And, as the chair of the OB/GYN department, was it your
9 responsibility to do something about a physician that could not
10 perform procedures?

11 A. As I said yesterday, my job was to try to find some
12 independent verification of this, of his abilities. There was
13 no one other than Dr. Porter who was saying this. While I
14 think that Dr. Porter has tremendous skill and she does have
15 tremendous ability to train and to teach, she had worked with
16 Dr. Hsu, and then the division in 2015 divided into a team Hsu
17 and a team Porter.

18 Q. Who was on -- I'm going to cut you off. Please excuse me.
19 Who was on team Hsu?

20 A. Casey, Marlene down in Manchester.

21 Q. I understood you yesterday to say in response to the June
22 16th assessment by Dr. Porter that you had brought Dr. Seifer
23 in to assess him.

24 A. Yes.

25 Q. Okay. So how long would Dr. Seifer need to determine

1 whether or not Albert Hsu should be doing egg harvests and
2 embryo transfers on patients?

3 A. I would expect that that should be done within the first
4 90 days.

5 Q. Was it done?

6 A. We didn't have a performance improvement plan for him, but
7 Dr. Seifer was working with Dr. Hsu.

8 Q. And you've heard here from Dr. McBean that Dr. Seifer is
9 not effectively addressing these issues; is that correct?

10 A. This had already been identified, and this was something
11 that we were addressing.

12 Q. I'd like you to turn to exhibit -- I'd like you to turn to
13 Exhibit 25. It's not clear to me if that has been entered as
14 an exhibit or not.

15 THE COURT: It has not.

16 BY ATTORNEY NUNAN:

17 Q. Okay. Thank you. Have you reviewed that email?

18 A. Yes.

19 Q. Okay. Can you tell me the date of that email?

20 A. 6/14/2017.

21 Q. Who is it from?

22 A. It's from me.

23 Q. To whom?

24 A. To the division directors and the residency program
25 director.

1 Q. And what is the subject line?

2 A. "Unanticipated downstream effects."

3 Q. Is unanticipated in quotes?

4 A. Yes.

5 Q. Why is that?

6 A. Because I think they these are all things that we did
7 foresee and didn't and don't consider them unanticipated.

8 Q. And when you say we, who do you mean?

9 THE COURT: Okay. So before asking any further
10 questions about this exhibit, are you seeking its admission?

11 ATTORNEY NUNAN: I am.

12 THE COURT: Any objection?

13 ATTORNEY SCHROEDER: No objection.

14 THE COURT: Plaintiff's Exhibit 25 is admitted.

15 (Plaintiff Exhibit 25 is admitted into evidence.)

16 THE WITNESS: We being those that are on the email.

17 BY ATTORNEY NUNAN:

18 Q. Who do you believe should have anticipated those
19 downstream effects?

20 A. We did anticipate them.

21 Q. Meaning this group was part of the decision?

22 A. This group was charged with picking up the pieces after
23 the REI division was let, was let go and the REI division was
24 dissolved. We had to make plans on how to absorb the nursing
25 staff, give them options of where they could remain within the

1 department, and then also understand what services we still
2 would be able to retain and then ideally to be able to put
3 together a plan to be able to reopen our services in the
4 future.

5 Q. This document here has some financials in the center of
6 it. Does this refresh your memory that the IVF was a
7 money-making division?

8 ATTORNEY SCHROEDER: Objection, Your Honor, asked and
9 answered. Mischaracterizes.

10 THE COURT: Sustained. That question was answered.

11 BY ATTORNEY NUNAN:

12 Q. So were you part of the decision to close the REI
13 division?

14 A. My recommendation had been to pause IVF services.

15 Q. Let me ask it a different way. Were you -- did, did you
16 get on board with the decision to close the division once it
17 was made clear to you that it was going to be closed?

18 A. I had no choice.

19 Q. I would like you to turn to Document 110, please. Have
20 you reviewed it?

21 A. Yes.

22 Q. Who is in an email -- it's an email from you to whom?

23 A. This is a short email. David Seifer had sent me a copy of
24 an article in the "Concord Monitor", and it was a reply back to
25 Dr. Seifer.

1 ATTORNEY NUNAN: All right. I'd like to move for the
2 admission of this Document 110.

3 THE COURT: Any objection?

4 ATTORNEY SCHROEDER: Just for rule of completeness,
5 Your Honor, we just want the article attached to it. I'm not
6 sure if we already have it in evidence, but, just under Rule
7 106, but we can hopefully deal with that on a break and
8 proceed.

9 THE COURT: So no objection to this exhibit, subject
10 to the provision of the article at some point in time if it's
11 not already in evidence?

12 ATTORNEY SCHROEDER: Correct, Your Honor.

13 THE COURT: Okay. Then Plaintiff's Exhibit 110 is
14 admitted.

15 (Plaintiff Exhibit 110 is admitted into evidence.)

16 BY ATTORNEY NUNAN:

17 Q. David Seifer writes to you in September of 2017 after the
18 closure of the REI division. He says, "In case you haven't
19 seen or read this article, interested in your take of
20 Dr. Conroy's interpretation of closing REI. In bold face
21 below, wasn't aware we closed because we couldn't recruit new
22 providers. Where does revised information like this come
23 from?"

24 And what did you say back?

25 A. I met with Dr. Conroy, and I, I hoped that she had been

VOLUME: 7
PAGES: 222-431

1 misquoted because I thought it was a mischaracterization of the
2 reasons that we closed the REI division.

3 Q. So the fact that you couldn't recruit new providers was
4 not correct; is that right?

5 A. Correct.

6 Q. And you wrote, "I met with Joanne and told her I hoped she
7 had been misquoted in the article because, if that is the
8 information that has been given to her, it is completely untrue
9 and now a different narrative that is in the public eye. I'm
10 not sure that she really cares."

11 Why do you write you're not sure that she really cares?

12 A. Because my meeting with her was incredibly unsatisfactory.

13 Q. Why?

14 A. Because I went to talk to her. I had not met with her
15 before about the closure of the division, and I met her for
16 coffee, and she, she said, Well, this is what I understand, and
17 wasn't willing to have a conversation. It was a very short
18 meeting, and I felt like she was not giving me time or
19 attention.

20 Q. Messaging surrounding the closure of the REI division was
21 important, correct?

22 A. It was important.

23 Q. Why?

24 A. It was important because the reason that we, the reason
25 that the division closed was that we were going to have to shut

1 down our IVF services. We wanted to pause them, but we could
2 not support our IVF services.

3 Q. Was Beth Todd reassigned to the OB/GYN division?

4 A. Yes.

5 Q. Why wasn't Misty Porter reassigned to the REI division?

6 A. I tried very hard to make that happen.

7 Q. Why wasn't she reassigned?

8 A. That was not a decision I was allowed to make.

9 Q. Did you weigh in on her termination?

10 A. I argued against her termination.

11 ATTORNEY NUNAN: I'd like to turn to Document 52.

12 Please forgive me. Is that in evidence?

13 THE COURT: Yes, it is admitted.

14 ATTORNEY NUNAN: Yes? Okay.

15

16 BY ATTORNEY NUNAN:

17 Q. Would you agree, at the time of the closure, there was a
18 lot of discussion about the messaging?

19 A. Yes.

20 Q. Okay. And you say in this email that the messaging is
21 very messy, correct?

22 A. Yes.

23 Q. And you say that, "The ideal message is that, because of a
24 staffing issue, we are stopping the ART procedures, but that
25 doesn't answer why we can't continue to do, continue doing NPW

1 and noninfertility evaluations".

2 So the staffing issue message wasn't, it was a little
3 thin?

4 ATTORNEY SCHROEDER: Objection.

5 THE COURT: Overruled.

6 THE WITNESS: The reason that I had recommended to
7 stop doing IVF and, in fact, we had contracted our IVF services
8 was because of staffing. I wanted to put a pause on IVF
9 services. We had an ongoing quality improvement project for
10 the REI division. Part of that was the pause on IVF services.

11 BY ATTORNEY NUNAN:

12 Q. You say down at the very bottom, "My life and the
13 messaging would be much easier if Jon Kakavas determined that
14 all three providers are at fault in the med diversion issue and
15 are facing a loss of license".

16 Your life would have been easier if Dr. Porter had lost
17 her license? This is a yes-or-no question.

18 A. Yes.

19 Q. I would like you to turn to Document 89, please. At the
20 bottom of Page 1 in response to Ed Merrens saying he's being
21 inundated and why can't Misty essentially be reassigned, you
22 respond, "What is the talking point? My suggestion is we
23 working with each physician on their employment options, as
24 well as what is best for DH and DH OB/GYN. I don't know how
25 you say, quote, I understand you are angry, but this decision

1 was made in the best interest of the division and Misty. Even
2 if that's the truth, no one will buy that at the moment".

3 In the paragraph above, Dr. DeMars, were you talking about
4 Misty's disability, her being out for 18 months on long-term
5 disability? This is a yes-or-no question.

6 A. No. Oh, excuse me. I don't know how to answer yes-or-no
7 to that.

8 Q. Okay. When you say, "Everyone is remembering Misty as a
9 full-time employee wearing three hats, and not the one who has
10 been out for almost 18 months", you're referring to her
11 long-term disability there, correct?

12 A. Yes.

13 ATTORNEY NUNAN: Okay. I'd like just a minute.

14 THE COURT: Yes.

15 ATTORNEY NUNAN: I'm done for now. Thank you.

16 THE COURT: Okay.

17 ATTORNEY NUNAN: Sorry about the technical
18 difficulties.

19 THE COURT: All right. Mr. Schroeder?

20 ATTORNEY SCHROEDER: Thank you, Your Honor. If I
21 could just have a few seconds to get set up if that's okay.

22 THE COURT: Yes.

23 CROSS-EXAMINATION BY ATTORNEY SCHROEDER

24 Q. Thanks for the Court's indulgence. Good morning,
25 Dr. DeMars.

VOLUME: 7
PAGES: 222-431

1 A. Good morning.

2 Q. You referred back to the use of the phrase providers in an
3 article in one of the documents that was shown by Ms. Nunan.
4 Do you remember that?

5 A. Yes.

6 Q. And how did you define providers in your mind?

7 A. Providers, to me, are the independent providers. They're
8 physicians, nurse practitioners.

9 Q. Okay. I just want to go back, Your Honor, just for
10 purposes of my direct examination, go beyond scope of the
11 cross.

12 Could you just tell the jury, Dr. DeMars, where you're
13 currently employed?

14 A. I'm employed at a biotech company called Bicycle
15 Therapeutics.

16 Q. Okay. And how long have you been there?

17 A. Since September of '23.

18 Q. Okay. And, just very briefly, what are you doing at
19 Bicycle Therapeutics? What is your job?

20 A. So Bicycle is a company that is making new drugs for
21 cancer patients. And my job is to, to run or administrate two
22 global trials for patients with cancer for, to hopefully bring
23 this new drug to cancer patients.

24 Q. Okay. And you're currently working on that right now?

25 A. Yes.

VOLUME: 7
PAGES: 222-431

1 Q. Would you describe your duties as global at this point?

2 A. Yes. One trial is in 6 countries, but my other trial is
3 in 28 countries, Has almost 200 sites.

4 Q. Okay. You're currently working on those studies right
5 now, correct?

6 A. Yes, I am.

7 Q. And am I correct that, when you do those studies, you then
8 have to present them to the FDA?

9 A. Yes.

10 Q. That's the Food and Drug Administration?

11 A. Correct.

12 Q. For whether or not they'll get approved, correct?

13 A. Correct. So I'm responsible for determining, well, the
14 proper conduct of the trial to prove whether the drug works and
15 also whether the drug is safe, and then we present those data
16 to the FDA and to European agencies and Asian agencies as well.

17 Q. With respect to -- and I want to go back in time. So when
18 did you, when were you employed by Dartmouth Health?

19 A. From January 1997 until December 31st 2018.

20 Q. And did you leave on your own accord?

21 A. Yes.

22 Q. Prior to that time, were you, you were the head of the,
23 chair of the OB/GYN department?

24 A. For part of that time.

25 Q. Okay. How long was that?

1 A. That was from 20, the January 2014 until August, I would
2 say, of 2017.

3 Q. That was when you were the chair of the OB/GYN department?

4 A. Yes.

5 Q. And, just so that the jury can understand your
6 responsibilities of chair of the OB/GYN department, how many
7 divisions -- and we'll go by time period, 2016 to 2017. Up
8 until the time that you were no longer the chair, how many
9 divisions are there in the OB/GYN department?

10 A. So there is the maternal fetal medicine division, the
11 urogynecology division. There is the generalists, general
12 OB/GYN division. There is gynecologic oncology, and there is a
13 division of midwifery.

14 Q. And did that, and then there's a --

15 A. And the division of reproductive endocrinology and
16 fertility.

17 Q. Let's see if my math is correct. I count six divisions
18 underneath OB/GYN

19 A. Yes.

20 Q. And just make sure you verbalize your answers, okay?

21 A. Yes.

22 Q. So there is maternal fetal medicine?

23 A. Yes.

24 Q. Urogyn?

25 A. Yes.

1 Q. Having a hard time reading my handwriting. Generalist?

2 A. Yes.

3 Q. And what's the generalist division, by the way?

4 A. The generalists are the nonspecialty OB/GYNs.

5 Q. Okay.

6 A. So they do general gynecology. They do obstetrics as
7 well.

8 Q. Okay. And obstetrics includes the labor and delivery?

9 A. Correct.

10 Q. So that's the third one. Gyn onc?

11 A. Yes.

12 Q. Is that your specialty?

13 A. Yes.

14 Q. Okay. Midwifery?

15 A. Yes.

16 Q. Did I say that correctly?

17 A. Yes.

18 Q. Okay. And REI?

19 A. Yes.

20 Q. So you had six divisions under you?

21 A. Yes.

22 Q. How many physicians at that time? So 2016 into 2017, how
23 many physicians reported to you directly or indirectly as chair
24 of the OB/GYN department?

25 A. Including the midwives?

1 Q. Yes. If you can recall. I realize this is --

2 A. It's probably 40.

3 Q. 40 physicians?

4 A. 40 physicians, midwives.

5 Q. Okay. So and in addition, so the midwives as well?

6 A. Yes.

7 Q. And about 40 physicians which includes that?

8 A. Correct.

9 Q. Okay. And then on top of that there are nurses, correct?

10 A. Yes.

11 Q. And there are other staff, correct?

12 A. Yes.

13 Q. In each of those divisions?

14 A. Yes.

15 Q. So, in total -- so set aside the providers, the
16 physicians, and the midwives including nurses and staff, and
17 how many people directly or indirectly reported up through your
18 chain of command as the chair of the OB/GYN department? And
19 just rough estimates here. I'm not asking --

20 A. I would say another 80.

21 Q. Okay. So over, in total, would it be fair to say that
22 over a hundred people reported to you directly or indirectly?

23 A. Directly or indirectly.

24 Q. Okay. There was a reference to, on your cross-examination
25 by Ms. Nunan, to an individual named Beth Todd. Do you recall

1 that?

2 A. Yes.

3 Q. And Beth Todd was employed as a nurse practitioner?

4 A. Yes.

5 Q. And she -- do you recall whether or not she had an
6 appointment, not only in the REI division, but that also in the
7 OB/GYN department?

8 A. She, she would have had an appointment in OB/GYN as part
9 of REI.

10 Q. Okay. And do you recall what her full-time status was in
11 terms of her hours towards the OB/GYN department versus REI
12 division at the time?

13 A. I don't. I think they were predominantly REI.

14 Q. Okay. So one of the questions I wanted to ask you about
15 in addition to that was, obviously, there's been a lot of
16 testimony about Dr. Misty Porter on your cross-examination, and
17 I just want to ask you a few questions without getting too
18 personal. But how long have you known Dr. Porter?

19 A. Since I arrived at DH.

20 Q. 1996, '97?

21 A. Yes.

22 Q. Okay. And how did you meet?

23 A. I mean, we met as members of the department. At the time,
24 DH had very few full-time female physicians on staff, so we
25 were two of the few.

1 Q. Small cohort?

2 A. A small cohort.

3 Q. And did you become friends as opposed to just colleagues?

4 A. I would have considered us friends, absolutely.

5 Q. Okay. And let me know if I'm getting too personal, but
6 were you ever a patient of Dr. Porter's?

7 A. Yes.

8 Q. And, without getting into all the details, did she assist
9 you in having any of your children?

10 A. Yes.

11 Q. And could you tell me, was that your second son?

12 A. That was my second son, yes.

13 Q. Okay. And, just for the jury's understanding, how many
14 kids do you have?

15 A. I have two.

16 Q. Two boys?

17 A. Two boys.

18 Q. Okay. And Dr. Porter assisted you with respect to having
19 your second son?

20 A. Correct.

21 Q. And when was he born?

22 A. He was born in 2003?

23 Q. Okay. And, after that point of 2003, did your
24 relationship with Dr. Porter become further? Did it develop
25 further?

1 A. I, I would have considered that we were, that we were
2 always friends.

3 Q. Well, did the fact that you had this physician-patient
4 relationship with her, did that further cement the bond with
5 her?

6 A. I'm, it's, the Upper Valley is a really small place. We,
7 we would -- I think Misty went out of her way to help me have
8 my second son, and I think that was really a point of how
9 strong our friendship was.

10 Q. Okay. And, after your second son was born, did there come
11 a time where you had play groups, so to speak, with Dr.
12 Porter's children and your children?

13 A. Not after my second son. I mean, it was more initially
14 because, after my second son, Dr. Porter's kids were, were
15 older than my second son.

16 Q. So let's go back to before that time. So from '96, '97 to
17 2003 when you had your second son, what, if any, socializing
18 did you and your family do with Dr. Porter and her family?

19 A. I mean, we did kid things together. You know, our kids
20 had birthday parties. Our kids had Boy Scouts, you know, all
21 the, all the usual kid activities that you do.

22 Q. And did that happen on a regular basis, not every week,
23 but just throughout the year?

24 A. I mean, yeah. I mean, I don't -- I think we were also
25 really busy with all of the other things that we had to do.

VOLUME: 7
PAGES: 222-431

1 Both of us were working a lot. So but we would get together
2 to, to, for family things, for kid things.

3 ATTORNEY NUNAN: Objection. This is beyond the scope
4 of her direct.

5 THE COURT: Okay. So I'll ask you to approach,
6 please.

7 (Bench conference begins.)

8 ATTORNEY NUNAN: I was trying to be patient, but I do
9 -- excuse me. I'll keep my voice down.

10 THE COURT: So this might be a good time for us to
11 talk about kind of the rules of the game just in terms of the
12 initial examination was a witness associated with an adverse
13 party, treated like a cross-examination. I know you had stated
14 when you started your examination about going beyond the scope
15 of the cross given the nature of --

16 ATTORNEY NUNAN: Is that where we are now? That
17 wasn't made clear to me.

18 THE COURT: Well, I thought Mr. Schroeder had said at
19 the beginning of his exam that, given the nature of this
20 particular witness, he would be asking questions beyond the
21 scope of the cross-examination.

22 ATTORNEY NUNAN: Okay.

23 THE COURT: Question for you, though. So this line
24 of questioning about personal relationships, family and
25 everything else, what is this getting to for your case?

1 ATTORNEY SCHROEDER: For my case?

2 THE COURT: Is this part of the case, or is it some
3 type of establishing some other kind of perception issue?

4 ATTORNEY SCHROEDER: I think it goes to both. I
5 think it goes to the answering the nature of the relationship,
6 which obviously they discussed on cross, but also goes to the
7 uniqueness of their relationship and the natural, the naturally
8 complicated relationship. So there was -- well, we can get --
9 if you want to take it on the break, I'm okay to do that, too,
10 Your Honor, but I've raised this issue repeatedly with
11 plaintiff's counsel. I've raised it repeatedly in court,
12 because of the nature of calling her on cross, could we flip it
13 over, and I think I'm asking very direct questions, but,
14 regardless, I've sort of been doing direct and cross with her
15 because I'm not calling her in the case in chief.

16 ATTORNEY NUNAN: And I want to apologize because I
17 had a very black-and-white notion here, and but you're telling
18 me that it's all mixed in together?

19 THE COURT: Well, I mean, a lot of your questions in
20 what would be a direct really amounted to a cross. So,
21 Dr. DeMars, under the rules I interpreted her as being a
22 witness associated with an adverse party, which gives you some
23 leeway to kind of ask kind of your leading questions on your
24 direct, slash, cross, which was more a cross-examination, and
25 now Dartmouth comes back and is doing her examination after you

1 went on kind of cross posture.

2 ATTORNEY NUNAN: Great. Obviously, I appreciate
3 that. Thank you.

4 THE COURT: Sure, sure. Okay. So we're on the same
5 page. So I'll tell them that we'll take a break now.

6 ATTORNEY NUNAN: All right. Thank you.

7 ATTORNEY SCHROEDER: Thank you, Your Honor.

8 (Bench conference ends.)

9 THE COURT: Okay. So, at this time, we'll take our
10 midmorning break, and we'll be ready to go, please, at about
11 10:35. Thank you.

12 (A recess was taken from 10:24 a.m. to 10:37 a.m.)

13 THE COURT: So, in light of the bench conference that
14 we had before, I did want to continue the discussion a little
15 bit with counsel. I'm wondering if maybe it's best if we come
16 back up to the bench on this.

17 ATTORNEY SCHROEDER: Sure.

18 THE COURT: So I just wanted to get some clarity.

19 Mr. Schroeder, do you plan on -- I just want to make sure I'm
20 alert to the facts here. Is Dr. DeMars going to be called as
21 part of your case in chief also?

22 ATTORNEY SCHROEDER: No.

23 THE COURT: Got it. Okay. And, if you said that and
24 I missed it, I'm sorry, but I just wanted to make sure. That
25 changes a little bit.

VOLUME: 7
PAGES: 222-431

1 ATTORNEY NUNAN: I wasn't complete -- you might have
2 said that to me as well, but I wasn't completely clear on that.

3 THE COURT: Okay, all right. All right. You might
4 guess what my concern is going to be, right? So more leeway on
5 your examination here amounts to two direct examinations in the
6 case, which obviously we wouldn't do if you were calling her as
7 part of your case in chief, but you're not. So you're
8 essentially doing your direct examination now, and that would
9 be it?

10 ATTORNEY SCHROEDER: Correct.

11 THE COURT: Okay.

12 ATTORNEY NUNAN: And what do you call what I do after
13 this, if I have an opportunity to go up, that is?

14 ATTORNEY SCHROEDER: Recross.

15 ATTORNEY NUNAN: Recross? Thank you.

16 THE COURT: You'll be able to re --

17 ATTORNEY SCHROEDER: Sorry, Judge. I jumped in on
18 this.

19 THE COURT: No, I think we all knew the answer on
20 that. Does that help you in terms of clarity?

21 ATTORNEY NUNAN: It does.

22 THE COURT: Helps all of us, frankly.

23 ATTORNEY NUNAN: Thank you.

24 ATTORNEY SCHROEDER: Thank you.

25 (The Jury enters the courtroom.)

1 THE COURT: Okay. Please proceed, Mr. Schroeder.

2 BY ATTORNEY SCHROEDER:

3 Q. Thank you, Your Honor. Just going back, Dr. DeMars, to
4 your reference to the OB/GYN department, prior to you becoming
5 the chair of the OB/GYN department, were you the head of any of
6 those divisions within the OB/GYN department?

7 A. GYN oncology.

8 Q. Okay. And is that your specific area of subspecialty?

9 A. Yes, it is.

10 Q. And has that always been the case?

11 A. Yes.

12 Q. Okay. And, with respect to the REI division, and -- well,
13 let me, for purposes of educating me as well as the jury and
14 the Court, what does GYN onc involve?

15 A. So GYN oncology is the specialty within obstetrics and
16 gynecology that takes care of women who have cancers of the
17 female reproductive tract, so ovarian cancer and uterine cancer
18 and cervix cancer, and we are both surgeons as well as
19 prescribers of chemotherapy.

20 Q. And, throughout the time that you were the OB/GYN chair,
21 did you also have clinical duties relating to work in the GYN
22 onc, as I'll call it, division?

23 A. Yes. I was half time as a gynecologic oncologist. So 50
24 percent of my time was as a, as a GYN oncologist, and then the
25 other 50 percent was supposed to be administrative.

VOLUME: 7
PAGES: 222-431

1 Q. Okay. Let me see if I can break that down. So 50 percent
2 of your time is administrative, and is that as the chair of the
3 OB/GYN department?

4 A. Yes.

5 Q. And we went over this already. Six divisions, over a
6 hundred employees, correct?

7 A. Yes.

8 Q. So that only half of your time out of your whole day, FTE
9 1.0 was accorded to that?

10 A. Yes.

11 Q. And the other, and the other half of your time you were
12 supposed to be doing clinical work?

13 A. Yes.

14 Q. So in the OR, chemotherapy, meeting with patients, is that
15 fair?

16 A. Yes.

17 Q. And, within that 50 percent of time as the chair of the
18 OB/GYN department, you had six divisions you were in charge of,
19 right?

20 A. Yes.

21 Q. And one of those divisions was the REI division, correct?

22 A. Correct.

23 Q. And, out of the six divisions, was that one of the larger
24 divisions, or was it one of the smaller divisions under your
25 supervisory and oversight responsibility?

1 A. It was, as an entire division, it was actually one of the
2 larger if you take into account both the lab and the, and the
3 physicians and nursing staff of the REI division. So the, the
4 IVF lab also fell under REI.

5 Q. Okay. And the IVF lab we've heard testimony about.
6 Dr. Navid Esfandiari?

7 A. Yes.

8 Q. And there were a whole series of people that were in that
9 lab, correct?

10 A. Yes.

11 Q. And the lab is not where the REI division physicians would
12 be meeting with patients or performing surgeries, right?

13 A. Correct.

14 Q. Okay. So you had all these responsibilities as chair of
15 OB/GYN department, and that was supposed to take up 50 percent
16 of your time?

17 A. Yes. Most chairs are .1 or .2 clinical rather than 50.5
18 or 50 percent.

19 Q. And, given the fact that you were designated .5 clinical,
20 did that mean you had to actually perform services to meet that
21 threshold?

22 A. Yes.

23 Q. So there were requirements of meeting with patients,
24 performing surgeries, et cetera, that there were metrics that
25 you were expected to meet from a clinical demand perspective

1 which was, at least was 50 percent of your FTE status?

2 A. Yes.

3 Q. And did you do that?

4 A. Yes.

5 Q. And, on top of that, the other 50 percent was the
6 administrative duties related to the OB/GYN department?

7 A. Yes.

8 Q. Okay. With respect to the REI division and IVF, we've
9 heard all those acronyms throughout your testimony, and others.
10 Do you have any specific expertise in REI or IVF?

11 A. No.

12 Q. Okay. And, when you testified earlier about needing to
13 independently evaluate either Dr. Hsu, Dr. Seifer, or anyone
14 else for that matter, what did you do to understand the level
15 of capabilities for those individuals?

16 A. So I was, I was speaking fairly frequently with other REI
17 physicians, Dr. Reindollar being one of them, another physician
18 who was at Baystate who was a senior REI physician to try to
19 understand where the differences in standard of care lie and
20 what the, what the current standards should be.

21 Q. And have you done that from time to time for other
22 specialty divisions that would be under your purview that you
23 didn't have specific expertise in?

24 A. I didn't have a need to.

25 Q. Okay. But, in this particular instance with respect to

1 REI, you reached out to people like Richard Reindollar,
2 correct?

3 A. Yes.

4 Q. Okay. If we could bring up P9, which I believe has been
5 admitted. Okay. Showing you a document that you've already
6 been shown, Dr. DeMars, and I just want you to take a quick
7 look at it, and then there's a second page to it which we'll go
8 to in a second.

9 A. Yes.

10 Q. Do you remember this exchange --

11 A. Yes.

12 Q. -- with Dr. Reindollar?

13 A. Yes.

14 Q. And was this one of the exchanges that you had with
15 Dr. Reindollar. Thank you, Rick. Was this one of the
16 exchanges you had with Dr. Reindollar about the REI division
17 and the members of it?

18 A. Yes.

19 Q. Okay. Now, Dr., at that point in July of 2016, was
20 Dr. Reindollar the chair or CEO of ASRM?

21 A. He was the head of ASRM. I don't know what exact title it
22 was.

23 Q. Okay, that's fair. And ASRM is what?

24 A. American Society of Reproductive Medicine.

25 Q. And I don't want to put words in your mouth, but is that

VOLUME: 7
PAGES: 222-431

1 like the gold standard for matters relating to REI?

2 A. So that -- sorry to interrupt. That would be the, the
3 body that would set the standards for practice in reproductive
4 medicine, in REI.

5 Q. Okay. And was your understanding that, after he left
6 Dartmouth Health, that he went to be, have some executive level
7 title at ASRM?

8 A. Yes.

9 Q. And had you worked -- prior to leaving Dartmouth Health,
10 what was his role? What was his title at Dartmouth Health?

11 A. He was the chair of the OB/GYN department.

12 Q. Okay. So the prior chair before you assumed the interim
13 title?

14 A. Correct.

15 Q. And did you work closely with him when he was the chair of
16 the OB/GYN department?

17 A. No, not particularly.

18 Q. Were you, at that point when he was the chair of the
19 OB/GYN department, were you the head of, I'm sorry, GYN onc?

20 A. Yes, I was.

21 Q. Okay. And did you have dealings with him as a result of
22 being the head of a division underneath the OB/GYN department?

23 A. Yes.

24 Q. Which he was chair of, correct?

25 A. Yes.

VOLUME: 7
PAGES: 222-431

1 Q. Okay. Now, I just want to read into the record that this
2 back-and-forth. You were asked by Ms. Nunan a handful of
3 questions about the exchange, but I want to go a little bit
4 deeper. And she focused very much on your comment, but then
5 the next, Richard Reindollar's response is that, "It's hard to
6 believe. He was in a large New York IVF practice for a number
7 of years. He inspired a number of residents to go into REI who
8 all speak highly of him. Remember when I came to Dartmouth,
9 the same was said of me, and I had done more ZIVF cycles a year
10 that Dartmouth did in five or more years. Beware of where you
11 get your info. I had never heard that he wasn't clinically
12 competent. Of course, anything is possible."

13 Was this a series of efforts by you to independently get
14 some help in determining the abilities of the various providers
15 in the REI division?

16 A. Well, this was the beginning of it. I mean, almost all of
17 these texts were followed by a phone call --

18 Q. Okay.

19 A. -- to get additional detail.

20 Q. And, during this time period of July 2016, Dr. Seifer had
21 just arrived there, correct?

22 A. Yes.

23 Q. And so he'd only been there a handful of weeks at that
24 point, correct?

25 A. Correct.

1 Q. And the REI division was just one of the six divisions
2 that you were responsible for out of 50 percent of your
3 full-time status, correct?

4 A. Yes.

5 Q. Okay. I want to ask you about the second page and
6 specifically the last exchange. By the way, it has a tag line
7 here "Birth Giver". Did you give yourself that tag line?

8 A. No. That was from my second son. He tagged me that as
9 part of our family chat so it became my name in all texts.

10 Q. So you didn't, you didn't come up with that name yourself?

11 A. No, no. My son.

12 Q. My middle son is the IT director in my house as well. So,
13 with respect to this last comment, you state, "I'm venting. I
14 really want him to be successful. I'm trying to keep the
15 hyenas at bay and get everyone in the boat. After everyone is
16 in the boat, I can work on getting everyone to paddle in the
17 same direction. I like him as a person, and I think he has
18 good ideas".

19 Who are you referring to there?

20 A. So I'm referring to Dr. Seifer.

21 Q. Now, Dr. Reindollar -- everybody's a doctor here.
22 Dr. Reindollar, he states, "The problem is that the REI
23 division has never been welcoming to outsiders or want to learn
24 if they have different ideas. Much of Sharon's behavior is to
25 protect Misty's turf. There could be clinical problems, but

VOLUME: 7
PAGES: 222-431

1 that is one aspect of David that would surprise me".

2 Did I read that correctly?

3 A. Yes, you did.

4 Q. He references the fact that the REI division has been
5 unwelcoming to outsiders. Did you have an understanding --
6 you've testified a little bit about the REI division. In this
7 timeframe or prior to this timeframe before Hsu and Dr. Seifer
8 were there, were you aware of whether or not the REI division
9 was unwelcome to outsiders?

10 A. Yes.

11 Q. Okay. And in what, what kind of examples can you give me?

12 A. We'd had another pair of junior REI faculty members join
13 the staff during Dr. Reindollar's tenure, and they ultimately
14 left very abruptly. They left Dartmouth and found a different
15 practice. They were -- one of them was the focus of a fair
16 amount of criticism very similar that she was unable to perform
17 the full scope REI activities and was not going to be a
18 productive member of the division, and the two of them left.

19 Q. Okay. Well, I want to break that down a little bit
20 because you mentioned a few things, and I want to make sure
21 that it's clear to the jury. There were two junior REI faculty
22 members that had been in the REI division when Richard
23 Reindollar was the chair of the OB/GYN department?

24 A. Yes.

25 Q. And were they married?

VOLUME: 7
PAGES: 222-431

1 A. Yes.

2 Q. And just go by first names here, Sophia and Neil?

3 A. Sophie and Neil, yes.

4 Q. Oh, Sophie? And you mentioned criticism of Sophie,
5 correct?

6 A. Yes.

7 Q. Who had that criticism?

8 A. Dr. Porter --

9 Q. Did she share that?

10 A. -- to me.

11 Q. Okay. You jumped ahead there. Just --

12 A. Sorry.

13 Q. -- take your time. Did she share that criticism with you?

14 A. Yes, she did.

15 Q. Did she share criticisms during the time period that
16 Dr. Reindollar was the chair of the OB/GYN department about
17 other members of the REI division?

18 A. Yes.

19 Q. Can you name who those individuals are?

20 A. She shared criticisms of Dr. Reindollar as well.

21 Q. Okay. Are you aware of what those -- what were those
22 criticisms that Dr. Porter had, if you recall, of
23 Dr. Reindollar?

24 A. I, I don't recall in any detail. I think they were
25 challenging his standards of care and plans, the similar

VOLUME: 7
PAGES: 222-431

1 ovulation plans and things.

2 Q. You say they. Do you mean the, the criticisms or Dr.
3 Porter or --

4 A. The criticisms. Sorry.

5 Q. And were they from Dr. Porter?

6 A. Yes. Those were from Dr. Porter to me.

7 Q. And they were criticisms of Dr., from Dr. Porter about the
8 former chair of the OB/GYN department, Dr. Reindollar?

9 A. They were. Those occurred while he was chair.

10 Q. Okay. And did she share criticisms of other members of
11 the REI department with you throughout that time period other
12 than Sophie?

13 A. I don't remember criticisms of Neil, and I, I don't
14 remember if there were criticisms of other nursing staff during
15 that time.

16 Q. Okay. Did the REI division, when Dr. Reindollar was the
17 chair of OB/GYN, encounter turnover in its ranks?

18 A. Neil and Sophie left.

19 Q. Do you recall nurses leaving?

20 A. And nurses left as well. I don't know as much of the
21 detail about who actually left during that time.

22 Q. Okay, fair enough. With respect to Dr. Reindollar's
23 comment about Sharon's behavior is to protect Misty's turf, do
24 you understand what that means? What, how did you interpret
25 that phrase?

1 A. So in, in my conversations with Dr. Reindollar, he also
2 described that there was a division within the division of REI,
3 that there was a Misty team and there was the other team,
4 whoever, whoever else there might be, but there were, there
5 were people who were long-term division members, Sharon, Beth

6 --

7 Q. Sharon Parent?

8 A. Sharon Parent.

9 Q. And Beth Todd?

10 A. -- Beth Todd -- who were firmly aligned to Misty and
11 aligned with Misty.

12 Q. And did you encounter that same phenomenon when Dr. Hsu
13 and Seifer joined the REI division?

14 A. It was, it was, there was clearly friction among the
15 nursing staff about who should take whose phone calls. There
16 was friction among the nursing staff about who should be
17 training, training a new nurse. There was, there was forever
18 friction and question about communication to patients. There
19 was friction about communication to providers and then also who
20 was actually covering or who was, was going to be doing a
21 specific task. It was this really frustrating, chaotic
22 environment.

23 Q. Are you aware of whether or not the REI division, this
24 frustrating, chaotic environment, as you call it, had a
25 reputation throughout Dartmouth Health of having these negative

VOLUME: 7
PAGES: 222-431

1 qualities?

2 A. It did.

3 Q. And did you hear that from more than one source?

4 A. It came from the nursing supervisor. It came from the
5 float pool. It came from our nursing HR folks trying to hire
6 new nurses.

7 Q. Okay. Did during the -- I want to shift gears a little
8 bit. During the 2016-17 timeframe, are you aware of whether or
9 not the REI division had any challenges -- you can take that
10 down -- had any challenges in recruiting nurses into the
11 division?

12 A. Yes.

13 Q. And do you recall whether or not there was a shortage of
14 nurses in the REI division as a result of a number of nurses
15 either leaving or departing for either termination or
16 resignation or retirement?

17 A. Yes.

18 Q. Just pull up P148 for a second? I just want to finish a
19 few thoughts before we get into another topic, specifically the
20 second page. The two side-by-side.

21 Dr. DeMars, you were asked a series of questions about the
22 back-and-forth here of Plaintiff's Exhibit 148. And if we go
23 to the next page, please. So specifically that, that middle
24 email, if you could highlight that, please where it says
25 "Misty" in the middle of it. Thank you.

VOLUME: 7
PAGES: 222-431

1 Now, Dr. DeMars, just a few real quick questions on this
2 because we're going to jump around a little bit to try to cover
3 everything so we can get you back out of here. So here you
4 say, "Misty, first don't apologize for our how our meeting
5 ended, frustration. It is worth looking at the month-by-month
6 trend. I know that the FET rate January through June was
7 horrible attributable to both technique and poor embryos per
8 Navid. Many left over still from Judy Stern's cryopreservation
9 protocol. July to December, much better. I think that it is
10 worth looking at all of the cycles in detail, including
11 technique. Jude's numbers are also oddly low, and I know that
12 she has exquisite technique".

13 And I, really, we're just going to stay on this section or
14 this topic for a second. Do you recall this comment that you
15 made, now looking at it again?

16 A. I mean, honestly, only looking at it --

17 Q. Just looking at it right now, right. It was prepandemic,
18 about eight years ago so understood. Fair response. Jude's
19 numbers, who is Jude?

20 A. That's Dr. McBean.

21 Q. Judy McBean?

22 A. Um-hum.

23 Q. Okay. And you were referring to the pregnancy rates?

24 A. Yes.

25 Q. Okay. And but she had, in your opinion, exquisite

1 technique, correct?

2 A. Yes.

3 Q. And did you receive that information from Dr. Porter about
4 Judy McBean?

5 A. Yeah. I think that, that she had been practicing for a
6 very long time and, you know, it was very accepted that she was
7 a consistent, high-performing provider.

8 Q. Okay. But, and despite being a high-performing provider
9 as a doctor or provider, her pregnancy rates were low, oddly
10 low, as you called them, right?

11 A. Yes.

12 Q. And you testified about this when Ms. Nunan asked you a
13 series of questions, but, in terms of pregnancy rates and
14 whether they're high, low, medium, there's a multitude of
15 factors that can go into that, correct?

16 A. Yes.

17 Q. And so, despite the fact that Dr. McBean maybe having a
18 sterling reputation and is an excellent provider and has, in
19 your words, exquisite technique, in this particular instance in
20 this particular year, her pregnancy rates were low?

21 A. Lower than usual, yes.

22 Q. Okay. So there's a number of factors, and you testified
23 to them, and I don't want to retread that territory again.
24 Okay, thank you. You can pull that down.

25 Do you recall a time period -- let me motion to strike

1 that.

2 With respect to your friendship with Dr. Porter, did you
3 continue to be friends throughout the 2000s and 2010 time
4 period into when you became chair of the OB/GYN department?

5 A. I considered ourselves friends, yes.

6 Q. Okay. And did you regularly text message with her?

7 A. Absolutely.

8 Q. Okay. Was she in -- I don't want to get too technical on
9 this question, but, in terms of your friends, right, we have
10 our top-tier friends, people that we regularly are in
11 communication with. Then we have the second level, maybe
12 college med school people, not med school for me, but law
13 school. And then, you know, you have the acquaintances in
14 town. Where would she rank in my little, you know, chart of
15 friends for you?

16 A. So, I mean, we would, we would be texting at least on a
17 weekly basis about things. We both had incredibly busy lives.
18 So, you know, we weren't going out to happy hour anywhere
19 because both of us were usually either working past happy hour
20 or at home with the kids for happy hour.

21 Q. Okay.

22 A. But, but she was a person that I would consider that I
23 would totally rely on if I had had a problem or an issue.

24 Q. On anything?

25 A. On anything.

1 Q. And, in terms of your daily, did you have daily
2 interaction with her or because you were in a totally different
3 area?

4 A. Yeah. No, because my clinical area was, was in a very
5 different place from, from the general OB/GYN department.

6 Q. Okay. So, in terms of proximity, you -- and I've been on
7 the Dartmouth Health campus. It's like a college campus. Your
8 area, general area of work on a daily basis was nowhere near
9 where Dr. Porter would be doing her work?

10 A. Correct.

11 Q. Okay. But, despite that, you certainly, on a weekly
12 basis, texted with her, right?

13 A. Yes.

14 Q. And did you socialize with her and her husband and you and
15 your husband?

16 A. Some.

17 Q. Okay. And, in addition, would you get together with her
18 for coffee or perhaps a late-night dinner or a snack?

19 A. No, not usually. Again, both of us, if we were -- Misty
20 was really very good about getting done with her work and
21 getting home to her family, and I admired her ability to do
22 that. I was quite a bit worse than that and usually either had
23 to take work home or stayed very late to get my work done.

24 Q. Okay. But you considered Dr. Porter to be somebody that,
25 if something happened at, say, 4:00 in the morning and you

1 needed somebody, would she be in the top tier of people that
2 you would reach out to?

3 A. Yes.

4 Q. Okay, shifting gears. With respect to 2015 into 2016 and
5 specifically at the end of 2015, kind of orient you to that
6 time period, do you recall going on a board examiners trip with
7 Dr. Porter?

8 A. Yes.

9 Q. And you guys shared a room?

10 A. Yes.

11 Q. And, in prior years, did you typically share rooms
12 together?

13 A. Yes.

14 Q. Did you do that as a normal course with any other
15 physician at Dartmouth Health?

16 A. So we did that as tradition for a number of years.

17 Q. Okay. But that wasn't my question.

18 A. Did I do that with anyone else from DH? No.

19 Q. Yeah, okay. That was my question. But you did, you guys
20 shared rooms once a year for -- how long was that board
21 examiner exercise?

22 A. It was, it was, generally, it was a solid week, but we
23 would come in often a day early, so Sunday to Saturday or
24 Saturday to Saturday.

25 Q. Okay. I'm familiar with that routine. With respect to

1 that board examiner exercise, so every year, would you do this
2 every year with her?

3 A. Yes.

4 Q. So every year. Was it always in December?

5 A. Yes.

6 Q. So every year you would spend seven, eight days together
7 sharing a hotel room?

8 A. Yes.

9 Q. And, during the course of that seven or eight days every
10 single year, did you have meals together?

11 A. Yes.

12 Q. Did you socialize together?

13 A. Yes.

14 Q. And you were doing that throughout 2014, 2015, right,
15 2013, going back, 2012?

16 A. Yes.

17 Q. Okay. So for at least four or five years?

18 A. For, oh, for probably longer than that, for at least, I'd
19 say, ten.

20 Q. Ten years? So for ten years you guys had one week, not
21 that it was an easy week, but you had one week together sharing
22 a hotel room every single year --

23 A. Yes.

24 Q. -- for ten years?

25 A. Yes.

1 Q. Do you recall shortly after that week -- well, do you
2 recall specifically that particular board examiners week in
3 December of 2015?

4 A. Yes.

5 Q. Okay. Did you leave that conference early?

6 A. I believe I did. I don't know. I don't remember what the
7 reason was.

8 Q. Okay. Would that have been highly unusual for you to
9 leave that early --

10 A. Yes.

11 Q. -- leave early?

12 A. Yes.

13 Q. Okay. Because, if you leave early, does that somehow
14 invalidate the whole board examiner exercise?

15 A. It makes it more complicated because there's a very
16 complex way that the examiners are matched with the examinees,
17 and to be taken out of that planning that takes months to do
18 puts a significant monkey wrench into the process.

19 Q. Okay. Did Dr. Porter, at any point before you left early,
20 indicate that she needed your assistance with respect to any of
21 her, any symptoms that she might be experiencing?

22 A. I remember that she was just starting to have some
23 symptoms that were making her go back to the room as soon as
24 she finished her exams.

25 Q. Did you or Dr. Porter have any idea what that was?

1 A. No.

2 Q. And did she ask you at any point, like, I need you to stay
3 here with me, or, You need to get me assistance at the
4 hospital, or anything like that?

5 A. No.

6 Q. Okay. But you stayed in touch with her by texting after
7 you left her early for that week, right?

8 A. Yes.

9 Q. And do you recall that, shortly after that, perhaps a week
10 or two later, that Dr. Porter's symptoms persisted to such an
11 extent that she had to go out on leave?

12 A. Yes.

13 Q. Okay. And was that the -- did you have any understanding
14 at that point in mid-December of 2015 as to the specific nature
15 of her illness?

16 A. No. I don't think anybody did.

17 Q. Okay. And, when you say symptoms, or what were some of
18 the symptoms that Dr. Porter was expressing to you that she was
19 experiencing, if you recall?

20 A. As I recall, it was vision changes, and it was -- I think
21 it was headache, and it may have been -- those two, I'm pretty
22 sure. I don't remember others.

23 Q. Okay. And do you recall then that Dr. Porter was out of
24 the office completely on a leave of absence for about six
25 months?

1 A. Yes.

2 Q. At that point in time, Dr. Seifer -- so December of 2015
3 all the way to June of 2016, towards the end of that leave of
4 absence is when Dr. Seifer joined?

5 A. Yes.

6 Q. But, prior to that time, Dr. Hsu was already there
7 working, right?

8 A. Correct.

9 Q. And, with respect to her leave of absence, did you have an
10 understanding of her condition at any point during that time
11 period while she was on a leave of absence?

12 A. I mean, from what I remember, this is a, this is a
13 condition that really disabled Dr. Porter. It was not clear
14 what was going on. It was not clear the extent of her
15 disability, nor was it clear about the trajectory or path to
16 recovering.

17 Q. Was she communicating that to you?

18 A. Yes.

19 Q. Because, even though she was out on leave, did you
20 continue to text with her or call her on the phone?

21 A. We would usually text.

22 Q. Okay. And, based on your friendship with her, did you
23 have, were you texting with her as an employee of your, of
24 OB/GYN, or were you texting her as a friend, or was it both?

25 A. I was texting her as a friend. As an employee, it was my

VOLUME: 7
PAGES: 222-431

1 job to, to not text her. You know, that, that, she was out on
2 leave, and, if you are out on a medical leave, that leave
3 should be respected. No one, no one calls. No one bothers.

4 Q. So, with respect to when you were texting her, though,
5 during that time period, were you texting her about work
6 matters, or were you texting her about her health condition?

7 A. I was texting her about her health.

8 Q. Because you were concerned about her?

9 A. Yes.

10 Q. Okay. When Dr. Porter came back to work in the summer of
11 2016, do you recall her asking for a series of accommodations?

12 A. Yes.

13 ATTORNEY SCHROEDER: If I can just show the Witness,
14 the Court, and plaintiff's counsel P129. And also the Witness.

15 COURTROOM DEPUTY: All set.

16 BY ATTORNEY SCHROEDER:

17 Q. Thank you. Okay. Can you read that okay, Dr. DeMars?

18 A. Yes.

19 Q. Now, this is a, it's Plaintiff's Exhibit 129, and it's
20 titled -- the date of it's July 19th 2016, "To whom it may
21 concern". Do you recall this, receiving this communication at
22 some point?

23 A. Yes.

24 Q. Okay. And what was it just generally?

25 A. So this is, this is a list of accommodations for someone

VOLUME: 7
PAGES: 222-431

1 with a brain injury and that these were recommended to her.

2 Q. To Dr. Porter?

3 A. Excuse me. To, to the department in order to allow Dr.
4 Porter to resume some work responsibility. So they were
5 highly, highly restricted.

6 ATTORNEY SCHROEDER: Okay. I move for admission of
7 Plaintiff's Exhibit 129.

8 ATTORNEY NUNAN: Could we have a bench consult for a
9 second?

10 THE COURT: Yes.

11 (Bench conference begins.)

12 ATTORNEY NUNAN: We're not litigating whether or not
13 she was accommodated or not, so I'm not quite sure why we're
14 going through this part. Maybe I'm misunderstanding something,
15 but we are not saying that she was not accommodated.

16 THE COURT: At work, right?

17 ATTORNEY SCHROEDER: That claim -- sorry. That claim
18 was dismissed by the court. However, there is a claim of a
19 failure to accommodate with respect to disability
20 discrimination regarding her termination, Dr. Porter's
21 termination so that that is a claim before the Court, whether
22 or not DH had an obligation to accommodate her disability by
23 putting her into a different position in the OB/GYN department,
24 and, in fact, Mr. Vitt actually was quoted in an article about
25 that very same issue. So they are litigating that issue.

VOLUME: 7
PAGES: 222-431

1 I have, I'm not going to go beyond this document more than
2 three minutes, but it certainly goes to Dr. Porter, Dr. DeMars
3 as well, in terms of her intent and what she was doing and
4 whether or not she was accommodating to Dr. Porter.

5 THE COURT: Okay.

6 ATTORNEY SCHROEDER: I'm sorry. I had another pause
7 there.

8 THE COURT: So the live kind of accommodation issue
9 is about whether she was given another position -- is that
10 accurate -- as opposed to --

11 ATTORNEY SCHROEDER: Correct.

12 THE COURT: -- whether she was given medical
13 accommodation while at work? And does this go more to medical
14 accommodation as opposed to the accommodation of a transfer to
15 another department?

16 ATTORNEY SCHROEDER: Correct, Your Honor, it does,
17 but it goes -- you can't separate the two, Well, I had, yeah, I
18 got all these accommodations over here, but then this one
19 accommodation I didn't get, without actually talking about the
20 fact that she did all these other accommodations.

21 And, certainly, I mean, set aside relevance. I mean, it's
22 certainly probative of Dr. DeMars's credibility with respect to
23 how she was treating Dr. Porter. This is a disability
24 discrimination case. These were accommodations she gave during
25 that time period. She's going to say, she'll say that those

1 are the ones that she wanted. They were given to her. This is
2 a plaintiff's exhibit, by the way, so I'm not sure why we have
3 an objection on admission, but --

4 THE COURT: It is your exhibit, that's true.

5 ATTORNEY NUNAN: It is. That is true.

6 THE COURT: So do you still oppose its use?

7 ATTORNEY NUNAN: I do. But, yes, I do.

8 THE COURT: Okay. So are you planning on introducing
9 this at some point in time?

10 ATTORNEY NUNAN: I think, at one point, we were.
11 We're not now.

12 THE COURT: Okay. And your argument is that these
13 particular accommodations that are requested is relevant to the
14 question of whether she should have been accommodated in terms
15 of another position as well?

16 ATTORNEY SCHROEDER: Of course.

17 ATTORNEY McDONALD: I think it also goes to the issue
18 of whether Dr. DeMars discriminated against Dr. Porter with
19 respect to her disability, because we do have a cat's paw
20 theory in play, and in that theory Dr. DeMars was the one who
21 purportedly discriminated against her, and ultimately --

22 ATTORNEY NUNAN: I see the reassignment and the
23 interactive process as different than accommodations. That's
24 what I would say.

25 THE COURT: Okay. Doesn't this, I mean, testimony

VOLUME: 7
PAGES: 222-431

1 further to this point, doesn't it seem to go the cat's paw
2 issue?

3 ATTORNEY NUNAN: Sure.

4 THE COURT: Okay. That's a live issue still.

5 ATTORNEY NUNAN: Okay, sure.

6 THE COURT: All right. So I'll allow you to inquire
7 into that. Question about the mode of questioning. So this is
8 your direct.

9 ATTORNEY SCHROEDER: Partially, yes.

10 THE COURT: Okay. Because of the format of the
11 questions, I haven't heard a lot of typical direct examination
12 form of questions. There is definitely a leading element.

13 ATTORNEY SCHROEDER: Understood. I will attempt to
14 fix that, Your Honor.

15 THE COURT: Okay, thank you.

16 ATTORNEY McDONALD: May I just ask counsel to ask
17 their client to speak a little bit more quietly? We can hear
18 her from our table, and I'm a little concerned the jury can
19 hear her as well. Thank you.

20 (Bench conference ends.)

21 ATTORNEY SCHROEDER: Move for admission of
22 Plaintiff's Exhibit 129.

23 ATTORNEY NUNAN: No objection.

24 THE COURT: Okay. Then Plaintiff's 129 is admitted.
25 (Plaintiff Exhibit 129 is admitted into evidence.)

VOLUME: 7
PAGES: 222-431

1 ATTORNEY SCHROEDER: May I have it published to the
2 jury?

3 THE COURT: Yes.

4 BY ATTORNEY SCHROEDER:

5 Q. Thank you. Dr. DeMars, very quick follow-up on this
6 particular document. There is a list here of various
7 recommended accommodations, as they're called. Do you see
8 that?

9 A. Yes.

10 Q. And there is also some additional handwriting there for
11 additional, it looks like, accommodations, correct?

12 A. Yes.

13 Q. And this was -- did you receive this in and about July 19,
14 2016?

15 A. Yes.

16 Q. And did you take steps to approve the accommodations that
17 were listed here?

18 A. Absolutely.

19 Q. And so there, did you do that in your capacity as the
20 chair of the OB/GYN department?

21 A. Yes.

22 Q. Okay. Did you communicate these accommodations to members
23 of the REI division?

24 A. Yes.

25 Q. You can take that down. Thank you. With respect to -- I

1 want to shift gears to -- well, let me just stay on the
2 disability issue for a second.

3 After Dr. Porter returned to the office in the summer of
4 2016, did she require another leave of absence thereafter?

5 A. Yes, she did.

6 Q. And did that, do you recall how many months that was that
7 -- did she require a leave of absence for a period of time?

8 A. Yes. It was essentially the rest of 2016.

9 Q. Okay. So did there come a time where she had an actual
10 surgery in 2016?

11 A. I believe so, yes.

12 Q. And was that the August-September timeframe?

13 A. I believe so, yes.

14 Q. And then after that there was a leave of absence related
15 to that surgery?

16 A. Yes.

17 Q. Now, prior -- shifting gears back to prior to Dr. Porter
18 being out of the office for two different leaves of absence,
19 right? By the way, before I go further, were those leaves of
20 absence related to each other?

21 A. Yes.

22 Q. Okay. And in the June-July -- do you recall, during the
23 summer of 2016, whether or not Dr. Porter was approved for
24 long-term disability benefits?

25 A. I don't know that for sure.

1 Q. Sure. So, with respect to the post-Reindollar time
2 period, so this would be when you became the interim chair of
3 the OB/GYN department. This would be 2014, 2015, 2016. Did
4 the, did you receive any information as to whether or not the
5 members of the REI department, division at that point in 2014
6 and '15 were experiencing any interpersonal friction?

7 A. Yes.

8 Q. Okay. And I'd asked you examples about that before with
9 respect to when Dr. Reindollar was the OB/GYN chair and the
10 interpersonal friction that he referred to, the Misty team
11 versus the everyone else. Was there any kind of friction --
12 well, what are the examples of friction that you could identify
13 in the 2014 to 2016 timeframe?

14 A. The friction was, largely surrounded the division into a
15 Hsu team and a Porter team and the nurses who were assigned to
16 the Porter team versus those who were assigned to the Hsu team
17 and then the, the lack of communication and the lack of
18 training among those nurses caused an intense amount of
19 friction. It also led to friction from nurses up to the
20 providers because there was questioning about plans, and my
21 understanding is that the, the meetings, the divisional
22 meetings, were not necessarily cordial and cooperative, but
23 that there was dissent during those meetings.

24 Q. And do you recall whether -- do you recall, as chair of
25 the OB/GYN department, receiving actual complaints from members

1 of the REI division about that behavior?

2 A. What I, what I received was complaints about Albert, about
3 Dr. Hsu. I did not directly get the, the internurse
4 complaints. Those went to the nurse manager.

5 Q. Who was that?

6 A. I think that was Katy Mansfield.

7 Q. Katy Mansfield was the nurse manager?

8 A. I think so.

9 Q. And so, if there were nursing complaints about turf wars,
10 if you will, they would have gone to the nurse manager?

11 A. Yes.

12 Q. Okay. But then they would bubble up to you?

13 A. Yes.

14 Q. And, with respect to the complaints about Dr. Hsu, did
15 they come from people other than Dr. Porter?

16 A. They usually came from those people who closely aligned
17 with her.

18 Q. And who would that be?

19 A. That would be Sharon Parent.

20 Q. Okay.

21 A. And that would be Beth Todd.

22 Q. Okay. And Beth, are you aware of the fact that Beth Todd
23 is still employed by Dartmouth Health?

24 A. No.

25 Q. Okay. Well --

1 A. I don't.

2 Q. Let me ask you. Let me see if I can get back to your
3 recollection or a period where you would recall. After the REI
4 division was closed, that was May, June of 2017?

5 A. Yes.

6 Q. Beth Todd remained employed by Dartmouth Health?

7 A. Yes.

8 Q. And she was in the OB/GYN department, correct?

9 A. Yes.

10 Q. And she was the only nurse practitioner from the REI
11 division, at the REI division at that time, right?

12 A. Yes.

13 Q. Okay. And she remained employed there throughout 2017
14 while you were still there, correct?

15 A. Yes.

16 Q. And she remained employed there throughout 2018 while you
17 were still employed?

18 A. Yes.

19 Q. I want to ask you about specific complaints from members
20 of the REI division. If we could put Exhibit Z on the screen
21 just for the Witness, lawyers, and the Court. Sorry. It's
22 Defendant's Exhibit Z. I'm not going to ask you any questions
23 about the attachment, Dr. DeMars, but this is, there is a email
24 exchange up top and below. Do you recall this series of email
25 communications?

1 A. No.

2 Q. Okay. Just take the time to read it, if you will, and let
3 me know when you're finished.

4 A. Okay.

5 Q. Okay. Does that refresh your recollection of the email
6 communication?

7 A. No.

8 Q. Okay.

9 A. Unfortunately. Sorry.

10 Q. Okay. No reason to doubt the fact that you received this
11 email, though, correct?

12 A. Correct.

13 Q. And this is from Dr. Seifer to you?

14 A. Yes.

15 Q. And did you receive, during the 2016 early, well, late
16 2016, early 2017 timeframe, complaints from Dr. Seifer that
17 related to interpersonal conflicts with Dr. Porter?

18 A. Yes.

19 Q. Okay. Would you consider this email to be one of those
20 examples?

21 THE COURT: Are you seeking admission of this?

22 ATTORNEY SCHROEDER: I would like to seek admission,
23 Your Honor. Apologies. I'd like to seek admission of
24 Defendant's Exhibit Z.

25 THE COURT: Any objections?

1 ATTORNEY NUNAN: No objection.

2 THE COURT: Okay. Defendant's Exhibit Z is admitted.

3 (Defense Exhibit Z is admitted into evidence.)

4 ATTORNEY SCHROEDER: Thank you, Your Honor. May we
5 publish it to the jury? Thank you.

6 THE COURT: Yes.

7 BY ATTORNEY SCHROEDER:

8 Q. And I really just want to focus on the top, well, the
9 first page. So on the bottom email it's from Dr. Porter to
10 Elizabeth Todd, Albert Hsu, Sharon Parent, and Judy McBean,
11 correct?

12 A. Yes.

13 Q. Now, at this point, this is August 2016, right?

14 A. Yes.

15 Q. Okay. At this point, Dr. Seifer is the division director,
16 correct?

17 A. Yes.

18 Q. And, prior to him being the division director, was there
19 an interim director?

20 A. That was Dr. Porter.

21 Q. Okay. How long had she been the interim director?

22 A. I'm not sure.

23 Q. Okay. Was she the interim director before you became the
24 interim board, the chair of the OB/GYN?

25 A. Yes.

1 Q. Okay. And, well, why didn't you make her the division
2 director?

3 A. There were two reasons. The first, the first and foremost
4 was that I was named an interim chair, and it was a position
5 that I did not intend to continue indefinitely, and I didn't
6 believe that it was the prerogative of an interim, while
7 awaiting the hiring of a full chair, to make that, make that
8 appointment.

9 The second reason was that, in my discussions with
10 Dr. Reindollar, one of the things I remember very clearly his
11 advice was not to make Dr. Porter the division chair as that
12 would not be in the best interests for the division.

13 Q. And so Dr. Porter, up until the time Dr. Seifer is
14 appointed division director, Dr. Porter was the interim
15 division director of the REI division, correct?

16 A. Yes.

17 Q. But she, and she remained the interim division director
18 for 2014, 2015, into early 2016, correct?

19 A. Yes.

20 Q. And then Dr. Seifer was hired above her into the division
21 director role, correct?

22 A. Yes.

23 Q. Now, with respect to this specific example or, I should
24 say, this specific exhibit, Exhibit Z, you see who the -- Dr.
25 Porter sent it to everybody except Dr. Seifer, correct?

1 A. Well, I think that there are probably some other folks who
2 were not included on it, but Dr. Seifer certainly was not
3 included on it.

4 Q. Right. He wasn't included on this, and then he sent you
5 an email up top on Exhibit Z, and it says here in the middle,
6 the middle paragraph, "As we previously discussed, below is the
7 initial email that Casey, Marti, Marlene, Navid and I were not
8 included in on sent by Misty. This was then followed by
9 another email on Sunday with additional articles not included
10 here on the same subject to the same group of people excluding
11 us five as well". Did I read that correctly?

12 A. Yes, you did.

13 Q. And then he goes on to say in the next paragraph, "The
14 email sent by Misty to everyone this morning in anticipation of
15 a planned, scheduled consensus meeting previously arranged
16 weeks ago between Emily and me for this Wednesday and not today
17 as she had apparently believed, with MFM/REI included three
18 articles but did not include the ones sent last Wednesday,
19 August 3rd, below or on Sunday, August 7, to her select group
20 below. Such an approach does not foster inclusiveness or frank
21 discussion. It undermines what we are trying so hard to
22 foster". Did I read that correctly?

23 A. Yes, you did.

24 Q. During this timeframe, did you receive from Dr. Seifer or
25 anyone else in the REI division frustrations relating to the

1 interpersonal dynamics within the REI division?

2 A. Yes.

3 Q. And did those continue? Those frustrations, did you
4 receive examples of that into the fall of 2016?

5 A. Yes. I think those were actually reflected in Dr.
6 Seifer's FPPE.

7 Q. Okay. And you referred to that before as part of the
8 evaluation process, correct?

9 A. Correct.

10 Q. And, if we may show the Witness and just the Court and
11 lawyers A, Defendant's Exhibit A4, as well as the Witness.
12 Okay. This is an email exchange between you and Dr. Seifer,
13 Dr. DeMars, and I'm going to focus really just on the -- well,
14 I'm going to focus on both, all three pages, so just take a
15 quick look to review it and let me know when you're finished.
16 We could bring up the other two pages.

17 ATTORNEY SCHROEDER: Your Honor, may I approach the
18 Witness just to give her a copy so she can see it in front of
19 her?

20 THE COURT: Yes.

21 ATTORNEY SCHROEDER: Sorry. Should have done that.
22 So, if you go to Tab A4. Sorry. That's the same document.

23 THE WITNESS: Okay.

24 ATTORNEY SCHROEDER: Just let me know when you've had
25 a chance to review it. Your Honor, while Dr. DeMars is

1 reviewing it, I'd like to move for admission of A4.

2 THE COURT: Is there any objection?

3 ATTORNEY NUNAN: No objection.

4 THE COURT: Okay. Defendant's A4 is admitted.

5 (Defense Exhibit A4 is admitted into evidence.)

6 ATTORNEY SCHROEDER: May we publish that to the jury,
7 Your Honor?

8 THE COURT: Yes.

9 BY ATTORNEY SCHROEDER:

10 Q. Have you had a chance to review it?

11 A. Yes.

12 Q. Okay. On the first page at the top, there is an email
13 from you to Heather Gunnell, correct?

14 A. Yes.

15 Q. Who is Heather Gunnell?

16 A. Heather Gunnell was the practice manager for the
17 department of obstetrics and gynecology, so sort of the
18 business, business manager.

19 Q. And was Ms. -- she's not a doctor, correct?

20 A. That's correct.

21 Q. Okay. Ms. Gunnell was the practice manager for the entire
22 OB/GYN department?

23 A. Yes.

24 Q. Okay. Did you receive from her any complaints ever about
25 Dr. Porter and her dealings with her?

1 A. I don't remember.

2 Q. Okay. With respect to that time period, though,
3 Ms. Gunnell was the practice group manager, so she had a
4 business role for each of the divisions?

5 A. Yes.

6 Q. And what would her business role be for the REI division
7 in November of 2016?

8 A. Heather and I were both heavily involved in trying to
9 develop a division improvement plan with the Value Institute at
10 Hitchcock.

11 Q. Division improvement plan through the Value Institute?

12 A. Yes.

13 Q. And this was in the November 2016 timeframe?

14 A. So we, the Value Institute was involved from early,
15 mid-2016 through at least March of 2017. They facilitated an
16 initial, an initial half-day, off-site meeting when Dr. Seifer
17 first arrived. They organized another workshop for the entire
18 division, which, if I remember appropriately, was in the
19 October timeframe and then another, another workshop for the
20 division in February.

21 Between all of those times where the entire division
22 participated, Heather Gunnell and I met with them on at least
23 an every-other-week basis, if not a weekly basis, to try to
24 implement or clarify issues that were raised during the
25 workshops.

1 Q. With respect to these workshops, is that unusual to have
2 that series of workshops for an improvement plan? What was the
3 purpose of these?

4 A. So the, the Value Institute is a, is a department at DH
5 that is highly skilled in, in looking at various aspects of
6 running a clinical program, whether that is efficiency, whether
7 that is communication, whether that is a process improvement.
8 They can take a very narrow focus, or they can take a very
9 broad focus. And we specifically were looking at the REI
10 division because of its historic difficulties with
11 interpersonal relationships and communication.

12 Q. Okay. And, specifically, with respect -- and that
13 happened into late '16 and early 2017, correct?

14 A. Yes.

15 Q. And, with respect to the Value Institute, at the end of
16 February '17, did they have, did they present any solutions to
17 you as chair of the OB/GYN department?

18 A. So this was extraordinarily hard because, after six months
19 of an amazing amount of work, their conclusions were twofold.
20 Their first conclusion was that the division as currently
21 constituted was unsalvageable, that the relationships had been
22 irreparably damaged and they were unsalvageable.

23 The second conclusion that they, and recommendation that
24 they made was that, in my intention to keep Dr. Porter on as a
25 member of the department, that I had to do two things upon her

1 return from her leave. The first was to very clearly confront
2 her that she was central to the dysfunction that occurred
3 within the division and that, if she were to continue in the
4 department of obstetrics and gynecology, that it could not be
5 in a leadership role within REI.

6 ATTORNEY SCHROEDER: Okay. I'd ask if we could show
7 the witness Defendant's Exhibit B, as in boy, 1.

8 COURTROOM DEPUTY: Is this just to the Witness?

9 ATTORNEY SCHROEDER: I'm sorry. Yes, Emerson, just
10 for the Witness and the Court and lawyers for now.

11 BY ATTORNEY SCHROEDER:

12 Q. And were you able to locate that document in the binder,
13 Dr. DeMars?

14 A. Yes.

15 Q. I'm just going to ask you about the first page, but,
16 certainly, take the time to understand what it is, okay?

17 A. Yes.

18 Q. This is an email dated February 20th 2017, right?

19 A. Yes, it is.

20 Q. And it's from Elizabeth Baker to you?

21 A. Yes.

22 Q. And the subject is "Personnel Issues"?

23 A. Yes.

24 ATTORNEY SCHROEDER: Okay. Your Honor, may I move
25 for admission of Exhibit B1?

VOLUME: 7
PAGES: 222-431

1 THE COURT: Any objection?

2 ATTORNEY NUNAN: No objection.

3 THE COURT: Okay. Defendant's B1 is admitted.

4 ATTORNEY SCHROEDER: Thank you, Your Honor. May we
5 publish for the jury?

6 THE COURT: Yes.

7 (Defense Exhibit B1 is admitted into evidence.)

8 BY ATTORNEY SCHROEDER:

9 Q. Thank you. Who is Elizabeth Baker, Dr. DeMars?

10 A. I don't remember her specifically, but I think she's part
11 of employee relations.

12 Q. And do you recall reaching -- was she part of human
13 resources at Dartmouth Health?

14 A. I think she was actually part of the work with the Value
15 Institute.

16 Q. Okay. So was this document that you were receiving from
17 Dr., from Ms. Baker, was that document in conjunction with the
18 Value Institute that you were previously testifying about?

19 A. Yes.

20 Q. Okay. Now, in the first paragraph if we could just blow
21 that up, it says, "I'm following up on our conversation a
22 couple of weeks ago regarding the provider issues within REI.
23 We discussed your concerns about leadership within the division
24 as well as certain undermining behavior by Dr. Porter. One
25 tool that we discussed was a memorandum of expectations at

1 least with regard to Dr. Porter's conduct. At that time, you
2 had stated you wanted to wait until February 15 to evaluate Dr.
3 Seifer and Dr. Porter's efforts and collaboration on the action
4 plan that was set for them as part of the work with the Value
5 Institute".

6 Did I read that correctly?

7 A. Yes.

8 Q. Does this refresh your recollection about any concerns
9 about Dr. Porter's behavior within the REI division that you
10 enunciated to the HR department at Dartmouth Health?

11 A. Yes.

12 Q. And attached to this efforts and collaboration was a
13 memorandum of expectations, a draft template. Do you see that?

14 A. Yes.

15 Q. Okay. And the draft template was to address -- what was
16 the, what was the purpose of the draft template memorandum of
17 expectations as you understood it?

18 A. As, as we talked about yesterday, that there is a series
19 of steps when there is unprofessional behavior that has been
20 identified, and a memorandum of expectations would be a very
21 clear outline of what those, what the preferred behaviors are,
22 and it's a next-level step up from just an inform that what you
23 have been doing is not in keeping with the standards of
24 behavior that we would expect at DH.

25 Q. Did you ever formally present this document or a template

1 of it to Dr. Porter?

2 A. I did not. She was out on leave at this time.

3 Q. Okay. And what about when she came back from leave; did
4 you present it to her at that point?

5 A. She didn't get back from leave.

6 Q. Well, in March and April of 2017, did she return in some
7 capacity?

8 A. No.

9 Q. You don't recall that?

10 A. No.

11 Q. Okay. So in 2017 right before the closure of the REI
12 division, do you recall her doing ultrasound at some point?

13 A. She may have come in, been working on a very limited
14 basis, but she, I remember that she was largely still on leave.

15 Q. Okay. Was she still on long-term disability benefits, if
16 you know?

17 A. I don't know.

18 Q. Okay. But, as far as you understood, she was still on a
19 leave of absence?

20 A. Correct.

21 Q. And were you still texting with her on occasion as a
22 friend?

23 A. Yes.

24 Q. Okay. And were you conflicted about giving your friend a,
25 potentially a memorandum of expectations when she did return?

1 A. I remember looking at the person who talked to me about
2 this and saying that this would have been the hardest thing I
3 would have ever had to do.

4 Q. Okay. And you never actually did it, right?

5 A. No.

6 ATTORNEY SCHROEDER: Your Honor, I am, not to
7 jump-start lunch, but I might be able to really condense over
8 the lunch break my continued examination so that we can move
9 more quickly.

10 THE COURT: Okay. Well, it is 12:00 o'clock, so
11 we'll take an hour break for lunch, and we'll see you back at
12 1:00.

13 (A recess was taken from 12:00 p.m. to 1:03 p.m.)

14 THE COURT: Okay. Mr. Schroeder?

15 ATTORNEY SCHROEDER: Yeah, I had just a quick
16 logistical issue, but also then one issue related to
17 Dr. Russell's proposed testimony making sure that we're heading
18 off any surprises. We have got Dr. Conroy here. I only have a
19 handful of questions for Dr. DeMars. I suspect there will be
20 some recross. I'm concerned about getting her out on time. I
21 understand they want to do Russell first then Conroy. I just
22 want to make sure that we get Dr. Conroy out of here by today.

23 ATTORNEY NUNAN: Right. If, so I do think that we
24 don't have much more with Dr. DeMars, and we will not have a
25 lot with Dr. Russell. So I do believe we will be able to get

1 Dr. Conroy on.

2 ATTORNEY SCHROEDER: So then okay. And I understand
3 that, and I appreciate it. With respect to Dr. Russell, there
4 is, I have a concern based upon her declaration. If her
5 testimony is limited to things that relates to this comment
6 that she purports Dr. Merrens said, that's one thing. There's
7 a reference in here to a case, unnamed. It's specifically
8 Paragraph 146 of her declaration.

9 THE COURT: And where is that?

10 ATTORNEY SCHROEDER: Sure. I'm sorry, Your Honor.
11 It's declaration of Michelle Russell. I think it's -- I don't
12 know which exhibit that is. I think it's a plaintiff's
13 exhibit. C5? C5. If plaintiff's counsel intends to -- and
14 it's C5, Paragraph 14. I'm certainly not putting it into
15 evidence, but, if we're getting into this specific example of
16 this specific case, then I would object to its, one, relevance
17 but, two, being highly prejudicial, and I don't want to deal
18 with that midstream.

19 THE COURT: All right. So I'm still looking for C5.

20 ATTORNEY SCHROEDER: Sure.

21 THE COURT: This is Plaintiff's C5?

22 ATTORNEY SCHROEDER: Defendant's.

23 THE COURT: Defendant's? Okay. That makes more
24 sense. Okay. So this is five pages long. I haven't read it.

25 ATTORNEY SCHROEDER: And I understand that, Your

1 Honor. Specifically, just Paragraph 14. It's really that's
2 the only objectionable part.

3 ATTORNEY NUNAN: C what?

4 THE COURT: So a couple of thoughts about this, but I
5 certainly want to hear from plaintiff. Would you like to say
6 something now?

7 ATTORNEY NUNAN: Yeah. Give me just two seconds.

8 Yes, now I know what you're talking about. First, this is the
9 first here we're hearing about this, and, second, it's my
10 understanding that the actions of Hsu and Seifer were the
11 motion of, there was a motion in limine, and their acts and
12 what happened with them is relevant here, and we have been
13 proceeding under that fashion.

14 THE COURT: And which motion in limine are you
15 talking about?

16 ATTORNEY NUNAN: The hearsay and character motion in
17 limine where we were talking about the acts of Hsu and Seifer.

18 THE COURT: Okay. You think this goes to hearsay and
19 character, that aspect of the motion in limine?

20 ATTORNEY NUNAN: No. I'm saying my understanding was
21 in this trial we are allowed to talk about what happened with
22 Hsu and Seifer in terms of the witnesses that we bring forward.

23 THE COURT: Right. Well, there was a ruling on that,
24 definitely. I'm not sure why this wasn't raised a long time
25 ago.

1 ATTORNEY SCHROEDER: Judge, to be honest with you, in
2 preparing for trial and specifically Ms. Russell or
3 Dr. Russell, I knew what the primary basis of her bringing this
4 up was for her testimony which was this OB/GYN department
5 meeting. I didn't recall that until looking at this last night
6 and seeing this specific paragraph, but I think it goes to
7 being -- it's one thing to say we're going to talk about these
8 cases and, you know, care that I watched or witnessed.

9 This is, this is like triple levels of hearsay, and I
10 suggest, I submit that this is, this specific paragraph and the
11 specific case, which there's no facts correlating her to it
12 other than to say, I know about this case that he handled. I
13 don't know how she does or any of specific facts, but it would
14 be highly prejudicial to get into this specific example here
15 today. It's not, this isn't a med-mal case.

16 THE COURT: Okay. And this is also a defense
17 exhibit?

18 ATTORNEY SCHROEDER: Well, we had it for impeachment
19 purposes. That's the only reason we had it on our Exhibit
20 list. We didn't seek to admit it, but, certainly, to your
21 instruction about not preserving things for impeachment or any
22 surprises, we put it on there in an effort to be overinclusive,
23 but I would not have otherwise put it on there but for
24 impeachment.

25 THE COURT: Okay. Go ahead.

1 ATTORNEY NUNAN: Dr. Russell cared for this patient.
2 She interviewed this patient. She has experience with this
3 specific patient and with Dr. Hsu's care. We think it's very
4 relevant and not prejudicial, or, if it's prejudicial, it's not
5 highly prejudicial.

6 THE COURT: Well, it's certainly relevant, right? I
7 mean, it goes to an example of performance by Dr. Hsu, and
8 that's kind of a central theme of the case, right, the
9 reporting of, in Dr. Porter's view, the substandard care of Dr.
10 Seifer and Dr. Hsu. So, in terms of the first prong of the
11 analysis, it's relevant. I don't hear you saying its
12 irrelevant.

13 ATTORNEY SCHROEDER: No, Your Honor, I wasn't
14 president saying that.

15 THE COURT: I just wanted to be clear for the record.
16 So your argument is under 403 the balancing favor is excluding
17 this?

18 ATTORNEY SCHROEDER: Absolutely, Your Honor. There's
19 one thing to say -- one, there's no indicia of when this
20 happened, where it happened, but also she's extrapolating.
21 She's Monday morning quarterbacking decisions like, well, if
22 they had had this prepregnancy test, then perhaps she wouldn't,
23 they would have detected it. It's all after the fact. She's
24 making summary conclusions about this particular care.

25 I can assure you there is no case involving this, so

1 there's no, there's no medical malpractice case involving this
2 particular incident. But she's saying, well, he should have
3 had, he should have done this testing, and then we necessarily
4 would have figured that out, and then we necessarily would not
5 have been able to solve it before pregnancy and then
6 there's no way to actually -- she's making these summary
7 conclusions as if she's an expert, and that's, that's highly
8 prejudicial just in and of itself, set aside the subject
9 matter, which is tragic.

10 The fact of the matter is, if you read the whole
11 paragraph, Your Honor, she's making summary conclusions after
12 the fact about what should have been done, and we're going down
13 a rabbit hole that's completely unrelated to a disability
14 discrimination retaliation case. It is.

15 THE COURT: I don't know if I agree with you on that.
16 I do think it's relevant to the claims here, but what is the
17 proffer as to Dr. Russell's knowledge? What is she going to
18 say on the stand about this particular incident? Is this, I
19 heard that this happened? Ms. Nunan?

20 ATTORNEY NUNAN: Sure. No. She's going to say that
21 a patient was admitted because of hypertension on the floor.
22 She was working. She came in. She took the patient's history.
23 She heard things about thyroid cancer that was extremely
24 unusual, and she went digging back into the patient's record
25 and discovered that there was a very clear early on indication

1 that this patient had issues that should have been caught.

2 Treatment should have been given to the underlying
3 condition before Dr. Hsu got this woman pregnant and that, if
4 she could put it together on a one interview, it goes back to
5 Dr. Porter saying in her eleven-page assessment of Dr. Hsu, he
6 did not have critical thinking skills, and he could not put one
7 and one together to make two, and this was the result. And
8 this was a common -- this is an example in the OB/GYN where the
9 generalists were saying, We've got a problem. We're supposed
10 to be able to rely on reproductive endocrinology specialists to
11 catch this stuff.

12 THE COURT: And so, if I heard you correctly, you're
13 saying Dr. Russell actually reported to the floor where this
14 patient was. You say she was called in; is that correct?

15 ATTORNEY NUNAN: Well, she was, she went to work, and
16 part of her job at work was to see this patient. She went in.
17 She sat down. She interviewed. She did a medical history of
18 this patient, and the answers she got, she'll tell you, she
19 went home, and she was thinking, This isn't right, and she went
20 in and dug around in her chart and discovered that this was a
21 problem that was very identifiable beforehand.

22 THE COURT: Mr. Schroeder?

23 ATTORNEY SCHROEDER: Thank you. Set aside the fact
24 that we're now relying on hearsay of a patient, whomever that
25 is, for purposes of this. This actually bears out exactly what

VOLUME: 7
PAGES: 222-431

1 I was thinking it was, which was an after-the-fact little
2 investigation to determine on her own, a generalist who is not
3 qualified as an REI IVF doctor, making summary conclusions.
4 She's going to come in here and act as if she's an expert, and
5 that's what the testimony that want, and that's highly
6 prejudicial. It's relying on hearsay. She wasn't.

7 It might be on the balancing act, if she had been the
8 treating physician at the time that the patient became
9 pregnant, that's one thing, but then to say at some future
10 point she comes into the hospital for hypertension and then she
11 does this analysis herself and these are her conclusions. How
12 is that not highly prejudicial? It's also relying on
13 inadmissible hearsay.

14 THE COURT: The hearsay being the statement of the
15 patient to Dr. Russell?

16 ATTORNEY SCHROEDER: The statement of the patient to
17 Dr. Russell, as well as any documents that she may or may not
18 have reviewed. I don't know what those documents are.

19 THE COURT: Okay. Ms. Nunan?

20 ATTORNEY NUNAN: Dr. Russell is in the maternal fetal
21 medicine. She's a high-risk OB/GYN. This was right within her
22 wheelhouse to take care of this patient.

23 THE COURT: Okay. So Dr. Russell is going on after
24 Dr. DeMars?

25 ATTORNEY NUNAN: That's correct.

1 THE COURT: Okay. So I'm going to read the whole
2 affidavit. I'm not going to do it now. I'd like to get the
3 jury back. Before Dr. Russell takes the stand, we can, we
4 should obviously talk about this again so you can get a ruling
5 from me on this, okay?

6 ATTORNEY SCHROEDER: Appreciate it, Your Honor. Just
7 trying to head it off.

8 (The Jury enters the courtroom.)

9 THE COURT: Mr. Schroeder.

10 BY ATTORNEY SCHROEDER:

11 Q. Thank you, Your Honor. Dr. DeMars, just a few quick
12 follow-up questions. In the REI division specifically, do you,
13 would you be aware of patient complaints that would happen from
14 time to time about care in the 2015-16 timeframe?

15 A. Yes.

16 Q. Okay. And do you recall whether those patient complaints
17 applied to all of the physicians, the providers in the
18 department, or was there one in particular? Patient
19 complaints.

20 A. About all in the department?

21 Q. Well, just in the REI division specifically.

22 A. Within the division?

23 Q. Right. From time to time, would there be complaints just
24 about relating to the fact that whether or not they became
25 pregnant or any other issues relating to their care?

VOLUME: 7
PAGES: 222-431

1 A. I recall a handful.

2 Q. Okay. If I could have the Witness turn to Defendant's
3 Exhibit G, so G as in girl, or guy, and just for the Witness
4 and counsel and the Court. Just, it's a -- I'm going to focus
5 specifically on the second page, but I just want to see if
6 you've had a chance to review it. Had a chance to review it?

7 A. Yes.

8 Q. Okay. On the first page this is an email exchange from
9 Michelle King, July 10th 2015, to Karen Boedtker, Keith Loud,
10 and yourself, right?

11 A. Yes.

12 ATTORNEY SCHROEDER: I'd like to move for admission
13 of Defendant's Exhibit G, please.

14 THE COURT: Any objection?

15 ATTORNEY NUNAN: No objection.

16 THE COURT: Okay. Defendant's Exhibit G is admitted.
17 (Defense Exhibit G is admitted into evidence.)

18 ATTORNEY SCHROEDER: May I publish it for the jury?

19 THE COURT: Yes.

20 BY ATTORNEY SCHROEDER:

21 Q. Thank you. So just going back to July of '15, I realize
22 we are jumping around on dates here, but Michelle King, is she
23 somebody that's at Dartmouth Health risk management group?

24 A. Yes.

25 Q. What about Karen Boedtker?

1 A. Yes, both.

2 Q. And who is Keith Loud?

3 A. Keith Loud was the chair of the pediatrics division of
4 CHAD. The Children's Hospital at Dartmouth or the pediatrics
5 department.

6 Q. Okay, thank you. Now, on the second page there is an
7 email addressed to Mr. Loud, and in the second paragraph it
8 says the following: "During a conference call today that I
9 initiated with Misty Blanchette Porter who put me on speaker
10 phone with Albert Hsu, my former attending, I was abruptly
11 dismissed from the care, they claimed at the advice of the risk
12 management team, question mark. Why were they even involved,
13 question mark? While just having initiated IM stimulation meds
14 with no concrete phone numbers, names, medical record transfers
15 or instructions on how to wean safely off the meds, et cetera.

16 After I had tried unsuccessfully to smooth things over and
17 move forward with my care on a positive note, she put me on the
18 defensive. I can honestly say I've never been treated so
19 disrespectfully and so cruelly by another medical professional.
20 After I voiced my concerns and experience and desire for a
21 reassurance that things would improve, she then responded,
22 quote, Well, I was all set to help you get pregnant, but now
23 that I have spoken with you, I think you have violated the
24 physician-patient trust for us, end quote, paren, by
25 complaining, close paren.

1 She ended by saying, quote, Try Eastern Reproductive Med.
2 They're private, end quote. And, when I voiced concern they
3 were not in network with my plan and I need other options, she
4 said, quote, I'm ending this call now, end quote, and actually
5 hung up on me, all because I complained in writing and verbally
6 that the care I was receiving was sloppy, and that I was
7 disappointed given Dartmouth's reputation.

8 After I got nowhere with customer relations, I did make
9 contact with the other group, which turned out to be, quote,
10 Northeastern Reproductive Medicine, end quote. Within two
11 hours, they had confirmed my insurance and given me an
12 appointment next Tuesday, something that took Misty's group
13 over two months to do, despite many phone calls and emails".

14 Did I read that correctly?

15 A. Yes.

16 Q. Do you recall whatever happened to this complaint?

17 A. I do not.

18 Q. Okay. But, at some point, this was a complaint that was
19 brought up to the risk management team at Dartmouth Health?

20 A. Yes.

21 Q. Okay, thank you. You can take that down. I want to ask
22 you about an individual whose name has come up here before,
23 Lisa McGee or Elizabeth McGee.

24 A. Yes.

25 Q. And so her name's Elizabeth McGee, but she goes by Lisa?

1 A. Correct.

2 Q. And back in 2017 were you in contact with her on a regular
3 basis?

4 A. Yes.

5 Q. Okay. And what was her role back then in, you know, at
6 UVM Medical Center?

7 A. So Dr. McGee was the division director for the REI
8 division at the University of Vermont.

9 Q. So she, would it be fair to say that she was in the same
10 role as Dr. Seifer?

11 A. Yes.

12 Q. And do you recall being in contact with her after you were
13 informed that the REI division was closing?

14 A. Yes.

15 ATTORNEY SCHROEDER: Okay. I'd like to show the
16 Witness Plaintiff's Exhibit 64. I'm showing you a document
17 marked Plaintiff's Exhibit 64, Dr. DeMars. Do you know what
18 that document is?

19 THE WITNESS: I don't have it.

20 ATTORNEY SCHROEDER: May I approach the Witness?

21 THE COURT: Yes.

22 THE WITNESS: Oh, in this one. Sorry.

23 ATTORNEY SCHROEDER: That's okay.

24 THE WITNESS: Too many books. Yes, yes.

25 BY ATTORNEY SCHROEDER:

1 Q. I just asked whether you recognize it.

2 A. Yes.

3 Q. And what is this?

4 A. So it's a series of text messages between me and
5 Dr. McGee.

6 ATTORNEY SCHROEDER: Okay. I'd like to move for the
7 admission of Exhibit Plaintiff's 64.

8 THE COURT: Any objection?

9 ATTORNEY NUNAN: No objection.

10 THE COURT: Plaintiff's 64 is admitted.

11 (Plaintiff Exhibit 64 is admitted into evidence.)

12 BY ATTORNEY SCHROEDER:

13 Q. Now and may I publish it for the jury too? Just Page 2.
14 Now, I want to just ask you about this timeframe. There's an
15 exchange that you have with Lisa McGee on May 3rd and May 4th
16 of 2017, but I want to ask you what communications, if any, did
17 you have with Lisa McGee in this timeframe related to the REI
18 division closure?

19 A. So we had, we had been having regular conversations about
20 the REI division but specifically relating to the division
21 closure. We had been -- we were preparing to close down our
22 IVF, and Lisa had been part of the conversation of where we
23 would send our patients to. But, but very specifically, once
24 it became very clear that the division was being dissolved, I
25 called Dr. McGee to tell her what was going to happen and to

1 recommend that she hire Misty for their open position that they
2 had.

3 Q. Okay. So did you call her before it had been announced
4 to, internally to the, that the REI division was closing?

5 A. I did.

6 Q. Okay. Did you tell her to keep it confidential?

7 A. Yes.

8 Q. And you said you recommended that she hire Dr. Porter for
9 an open position at UVM Medical Center?

10 A. Yes.

11 Q. This is before May 4th, correct?

12 A. Yes.

13 Q. And then, if you look at the bottom of Page 2 here, it
14 says -- well, there's a comment from Lisa McGee on May 3rd.
15 You send a smiley face and then you also say on May 4th at 8:08
16 a.m. Is that right before the announcement of the REI division
17 closure?

18 A. That was right before our actions, yes.

19 Q. Okay. And you say, "You might want to reach out to our
20 friend tonight", right?

21 A. Yes.

22 Q. If you go on the next page, Lisa McGee writes to you. She
23 says, "Will do. She texted me yesterday, and I put it off to
24 have her call me this morning. Thanks for the heads up",
25 right?

VOLUME: 7
PAGES: 222-431

1 A. Yes.

2 Q. And then you said, "Speaking as a friend", right?

3 A. Correct.

4 Q. Who were you referring to?

5 A. A friend of Misty's.

6 Q. Okay. And, with respect to reaching out and texting, were
7 you telling Lisa McGee to text with Dr. Porter?

8 A. Yes.

9 Q. And was this in conjunction with the conversation you had
10 separate from this text string to Dr. McGee to hire Dr. Porter?

11 A. Yes.

12 Q. She then says, "Absolutely. Spoke with her just now for a
13 bit and will talk with her later. She's in clinic. She will
14 be okay, and you guys friendship will remain intact, but it is
15 an uncomfortable time". Right, that's what she said?

16 A. Yes.

17 Q. And then you said, "Thank you"?

18 A. Yes.

19 ATTORNEY SCHROEDER: That's all the questions I have
20 for now, Your Honor.

21 THE COURT: Okay. Ms. Nunan?

22 REDIRECT EXAMINATION BY ATTORNEY NUNAN

23 Q. Dr. DeMars, during the credentialing process, you received
24 a charge from Dr. Merrens that Dr. Seifer's success was on you,
25 right?

VOLUME: 7
PAGES: 222-431

1 A. Um-hum. Yes. Sorry.

2 Q. And you understood that you needed to make David Seifer
3 succeed; is that correct?

4 A. That I was responsible for his success, yes.

5 Q. And you went to great lengths to try to make David Seifer
6 succeed, right?

7 A. I went to great lengths to try to make that division
8 succeed.

9 Q. I asked you about David Seifer.

10 A. I had hoped that David Seifer would be the successful
11 leader that I needed.

12 Q. He didn't turn out to be?

13 A. He did not.

14 Q. And what did Dr. DeMars say to you, I mean, Dr. Merrens
15 say to you when he asked you to step down as chair?

16 ATTORNEY SCHROEDER: Objection, Your Honor. First,
17 beyond the scope.

18 THE COURT: Overruled.

19 THE WITNESS: He said that we no longer had a working
20 relationship.

21 BY ATTORNEY NUNAN:

22 Q. Did he tell you it was a failure of leadership?

23 A. I'll accept that.

24 Q. So, during the summer of 2016, you had received a fairly
25 lengthy email from Dr. Porter stating there were real problems

VOLUME: 7
PAGES: 222-431

1 with David Seifer's egg harvests and transfers, right?

2 A. Those were the first harvests that she observed.

3 Q. Okay. And you started meeting on a weekly basis with
4 David Seifer, is that right, during that summer?

5 A. Yes.

6 Q. And you helped him plan the retreats that you spoke about,
7 the Value Institute retreats?

8 A. I wouldn't say that I helped him plan it. I think those
9 were planned by Heather in the Value Institute.

10 Q. I'd like to read you your deposition answer. "So I met
11 with him on a weekly basis regarding his own thoughts and plans
12 for the division. We planned a fall retreat, a one-day retreat
13 with the Value Institute shortly after he got there to be able
14 to set up expectations for ways of working and team building".
15 Does that refresh your recollection?

16 A. Well, that was not what we were always meeting about.

17 Q. That's fair. But you did set up the Value Institute
18 retreats with him?

19 A. I met with him and talked about our expectations for that
20 meeting, yes.

21 THE COURT: Can I ask counsel to approach, please?

22 (Bench conference begins.)

23 THE COURT: Sorry to bring everyone back again, but
24 it's a process point. If you're going to use a deposition, I'm
25 assuming you were trying to -- you said, Did that refresh your

VOLUME: 7
PAGES: 222-431

1 recollection? I initially interpreted that as you were
2 impeaching the Witness. So there is a procedure we have to
3 follow here when we're using prior sworn statements, okay? You
4 have to ensure that the other side has a copy of it. You have
5 to establish a foundation with the witness as to when the
6 deposition occurred, the date of the deposition. You have to
7 give the witness, if you're impeaching, you have to give the
8 witness an opportunity to admit that something was said in a
9 prior statement.

10 If the witness does admit that, then that that ends it,
11 and then the deposition transcript, goes away. That's as far
12 as it goes. If you're using a depo transcript that hasn't been
13 used already, you need to identify it, okay? This kind of goes
14 for everyone, but to just kind of make a general reference to
15 at your deposition without being any more specific leaves us in
16 a spot where it's just not kind of impeachment. It's just not
17 adequately documented.

18 ATTORNEY NUNAN: Okay, okay. It's ID3. We've
19 already put it in. Okay. So I want to make sure I understand.

20 THE COURT: Yeah. I know, and this goes for everyone
21 so I hope you don't think I'm saying this to you specifically.
22 So a document, I mean, you could say, you know, you can
23 reference ID3, right, so we know what you're talking about, but
24 then you should be establishing with the witness just kind of,
25 again, a general timeframe.

VOLUME: 7
PAGES: 222-431

1 ATTORNEY NUNAN: So I did. I did say it was to
2 refresh her recollection, but I did mean to impeach her with
3 it.

4 THE COURT: Because, if you are refreshing her
5 recollection -- I hope this doesn't come across to people as
6 I'm speaking down to people.

7 ATTORNEY COFFIN: Good info. Keep it going.

8 ATTORNEY NUNAN: I am probably the least experienced up
9 here so --

10 THE COURT: No, you're doing fine, but, in terms of
11 refreshing recollection, right, so you're going to have to get
12 a response from the witness that the witness does not remember,
13 not, I don't know, doesn't trigger refreshing her recollection.
14 So, if the witness says, I don't remember, then there has to be
15 kind of a, Well, you know, what would refresh your
16 recollection?

17 Now, this is not your witness, so I think there's some
18 leeway. If you say, Would your deposition transcript refresh
19 your recollection? If you're going to use it, though, then you
20 place it in front of the witness, have the witness read it, and
21 then you have to take it back and ask it if refreshes her
22 recollection, and then, if it does, she confirms that it does,
23 then you can ask the question, okay?

24 I just want to you know there's been a little bit of this
25 going on since the trial started, and I just want us to kind of

1 be clear on the procedure. So all right. So, when Ms. Nunan
2 is done, by the way, you know, this is a different witness in
3 terms of the posture. So make sure we're all on the same page,
4 Ms. Nunan started out with cross. You did your direct. She's
5 recross-examining. When she's done, do you have an expectation
6 of getting up again?

7 ATTORNEY SCHROEDER: No. I am hoping that we go on
8 after the depo transcript because it was a minor point in my
9 mind, and I really want to -- I'm more worried about Dr. Conroy
10 being able to leave today. So I, to be specific, I don't
11 expect any questions if we are going to end up real soon.

12 THE COURT: And, if you do, though, that's proper,
13 right? I just want make sure we're --

14 ATTORNEY SCHROEDER: I assumed I would be able to get
15 up. I'm just telling you, Your Honor, that I'm hoping not to.

16 THE COURT: I just wanted to be clear on that, and I
17 hope you understand the way that was intended. Yeah.

18 ATTORNEY NUNAN: Like I said, I do not mind taking
19 that.

THE COURT: Okay. Thank you.

21 (Bench conference ends.)

22 BY ATTORNEY NUNAN:

23 Q. Dr. DeMars, earlier today with Attorney Schroeder, you
24 said you set up the Value Institute meetings and for entire
25 division participation?

VOLUME: 7
PAGES: 222-431

1 A. Yes.

2 Q. And the purpose of this was team building, correct?

3 A. The purpose was multifold.

4 Q. Okay. And you're aware that Dr. Porter was unable to
5 attend 50 percent of the Value Institute retreats that were
6 held?

7 A. Yes, because she was on leave.

8 Q. So I'd like to put up Exhibit 13, which is in evidence.
9 She says right here on Page 2, "At point when I was aware it
10 was reasonably unlikely I'd be able to attend the recent full
11 team retreat, I made a request to postpone the meeting to a
12 time when I could attend. In early to mid-August, I personally
13 asked him to move the date out. I do not know if proceeding
14 the preceding the date, if proceeding with the date was his
15 decision alone, but as the longstanding REI division member, to
16 be excluded from the team function was alienating".

17 This is an email to you, correct, from Dr. Porter?

18 A. Yes.

19 Q. So I want to put it on the ELMO because I do not have a
20 digital copy of this. The email that you looked at -- try to
21 speak up because I'm not in front of the microphone. The email
22 that you looked at with Attorney Schroeder, this is A4.

23 COURTROOM DEPUTY: This is not admitted; is that
24 correct?

25 ATTORNEY NUNAN: A4 is not admitted in evidence?

VOLUME: 7
PAGES: 222-431

1 COURTROOM DEPUTY: Oh, I'm sorry. It is. My
2 apologies.

3 BY ATTORNEY NUNAN:

4 Q. That's okay. I'd like to run through this quickly. So
5 this is a three-page document. Heather Gunnell is reaching out
6 to everyone, "REI clinical team, I would like to find a time
7 Friday or Monday, whichever works best for the team, for all of
8 us, for us all to meet and discuss the plan for covering the
9 nurse tasks and for recruiting", okay?

10 There is some back-and-forth. Donna says, "I think Friday
11 might work well". Dr. Porter responds back to the Friday or
12 Monday question and says, "I'm out of town until Monday. I
13 would prefer Monday". Dr. Seifer then proceeds with talking
14 about a Friday meeting, and on the first page Misty writes back
15 to him and says, "Meeting for tomorrow for me is not possible.
16 Since I have the most experience with nursing on the service,
17 it would seem a missed opportunity", and Dr. Seifer responds
18 and then sends this thread to you.

19 Isn't Dr. Porter asking to be included in this meeting?
20 Isn't this asking for inclusion?

21 A. I think that Dr. Porter is actually trying to direct the
22 meeting, that she, again, is on disability, she is out. She
23 has limited opportunity to be included and limited opportunity
24 to be present for meetings and that, when the majority, when
25 the majority of the, of the division is available as documented

1 by Donna, then that's the best time to have the meeting. It
2 cannot turn on a single person.

3 Q. I'm sorry. She's given the option of Friday or Monday.
4 She says she's out of town. I don't quite understand why this
5 is not just a scheduling issue. Why do you then --

6 A. Because perhaps most of the rest of the division was not
7 available on Monday.

8 Q. It doesn't say that in here, does it?

9 A. Donna says it will work best for the division for Friday.
10 It only doesn't work for Misty on Friday.

11 Q. And then you forward this email to Heather Gunnell, who is
12 not a doctor. She's not a nurse practitioner. She's just the
13 practice manager, correct?

14 A. She is the practice manager who has been involved in
15 working with the Value Institute, and this is after our first
16 Value Institute retreat, in which case this, this behavior of
17 splitting was identified.

18 Q. Is it appropriate for the chair of the OB/GYN department
19 to be writing to the practice manager that this is splitting
20 behavior?

21 A. This was splitting behavior, and this is exactly what we
22 were working on at the Value Institute. You could see that
23 when we were working at the retreats.

24 Q. That Misty wasn't at?

25 A. That Misty would intermittently be at. She would phone in

VOLUME: 7
PAGES: 222-431

1 for part of it, and, when she phoned in, the entire tenor of
2 the interactions would change.

3 Q. This is B1.

4 A. Yes.

5 Q. The Memorandum of Expectation which is mentioned in this
6 email, you never filled it out, did you?

7 A. I did not.

8 Q. You never gave it to Dr. Porter?

9 A. She was on her leave of absence.

10 Q. Okay. In the spring of 2017, Dr. Porter was working 16 to
11 20 hours a week. Is that information that you were aware of?

12 A. I don't believe she was working that much consistently,
13 no.

14 ATTORNEY NUNAN: Okay. Were you aware -- this is
15 Exhibit 37, which has been admitted, right? I just don't want
16 to put it up until it has.

17 COURTROOM DEPUTY: Yes.

18 BY ATTORNEY NUNAN:

19 Q. In the spring of 2017, Dr. Porter was working her way back
20 and being proctored into surgery. Do you have any recollection
21 of that?

22 A. Yes.

23 Q. Okay. So the email in front of you is Dr. Padin saying --

24 A. I have no email in front of me.

25 Q. Okay.

1 ATTORNEY NUNAN: Is it on her screen? My apologies.
2 COURTROOM DEPUTY: Give me one second. There it is.
3 Sorry.

4 BY ATTORNEY NUNAN:

5 Q. So, if I represented to you that, in the spring of 2017,
6 Dr. Porter was working 16 to 20 hours a week, you would
7 disagree with that?

8 ATTORNEY SCHROEDER: Objection.

9 THE COURT: Overruled.

10 THE WITNESS: I don't remember. I don't think she
11 was working 16 to 20 hours consistently.

12 BY ATTORNEY NUNAN:

13 Q. Do you remember?

14 A. No.

15 Q. Okay. And in this email Dr. Padin has proctored a surgery
16 and is telling Misty she's a talented surgeon, right? Do you
17 see that?

18 A. Yes.

19 Q. So I guess you are receiving reports in the spring of 2017
20 from people like Judy McBean that Dr. Hsu is a harm to patient
21 safety in the OR. Why are you focused on Dr. Porter's emails
22 about whether or not she can attend a meeting or not?

23 ATTORNEY SCHROEDER: Objection, Your Honor.

24 BY ATTORNEY NUNAN:

25 Q. Why aren't you focused on the patient harm issue at the

VOLUME: 7
PAGES: 222-431

1 time?

2 THE COURT: An objection has been made. Basis?

3 ATTORNEY SCHROEDER: Mischaracterizes her earlier
4 testimony.

5 THE COURT: So I'll --

6 ATTORNEY SCHROEDER: Also a compound question.

7 THE COURT: I'll sustain the objection and ask you to
8 rephrase, maybe in the form of a couple of questions.

9 BY ATTORNEY NUNAN:

10 Q. Sure. This is Exhibit 23. Dr. McBean is saying to you
11 about Dr. Seifer, "One of my biggest concerns that I have is
12 with regard to his management of Albert Hsu. Albert does not
13 have an adequate skill set with regard to surgery and patient
14 care. He regularly practices outside of the ASRM standards
15 with regard to IVF, which is both ineffective and costly to
16 patients. His surgical skills endanger patients".

17 A. We had two things in place. The --

18 THE COURT: I don't believe there's a question posed.
19 Is there?

20 THE WITNESS: Excuse me.

21 BY ATTORNEY NUNAN:

22 Q. Got it. My question is, Isn't this a higher priority at
23 this time for you as chair of the OB/GYN department?

24 A. I had two things in place addressing this. First was that
25 Albert was having to review the cases that he was going to be

VOLUME: 7
PAGES: 222-431

1 doing, and he had another surgeon with him.

2 Q. Who?

3 A. It depended on what the procedure was going to be.

4 ATTORNEY NUNAN: Okay. No further questions.

5 ATTORNEY SCHROEDER: Judge, just two questions.

6 THE COURT: Okay.

7 RECROSS-EXAMINATION BY ATTORNEY SCHROEDER

8 Q. Just on that. Thank you, Your Honor. Dr. DeMars, just
9 very quickly, Judy McBean, I want focus just on a comment that
10 Ms. Nunan just asked you about. Judy McBean was a per diem
11 doctor for the REI division?

12 A. Yes.

13 Q. And her principal practice was in Brattleboro, Vermont?

14 A. Yes.

15 Q. Okay. And do you recall how often she would be in the REI
16 division in 2017?

17 A. In 2017, once, maybe once monthly.

18 Q. Once a month? Okay. Do you know her relationship with
19 Dr. Porter?

20 A. So, first of all, Dr. McBean was actually a medical
21 student with me at UVM and then was a, was a fellow in the REI
22 division at UVM with Dr. Porter.

23 Q. Okay. Did they have a close relationship?

24 A. Yes.

25 ATTORNEY SCHROEDER: Thank you. Thank you, Your

1 Honor.

2 THE COURT: Okay. All right. Dr. DeMars, you may
3 step down.

4 THE COURT: All right. So, before the next witness
5 is called, I am going to ask the jury if you would just retire
6 to the jury room. I have to speak with the lawyers. Thank
7 you.

8 (The Jury leaves the courtroom.)

9 THE COURT: Okay. So, at this time, I'm just going
10 to step off briefly and read the declaration and come back, and
11 we can have a discussion about the issue that was raised at the
12 lunch break, and I will be back momentarily, okay?

13 ATTORNEY SCHROEDER: Thank you, Your Honor.

14 (A recess was taken from 1:52 p.m. to 2:12 p.m.)

15 THE COURT: Okay. So I have read the affidavit, and
16 the affidavit, just for the record, is contained in Defendant's
17 Exhibit C5, Exhibit 3. So I'll just begin by framing the issue
18 as I understand it. So there's a declaration that was
19 completed by Dr. Michelle Russell who is going to be testifying
20 this afternoon. An objection was raised by the defendants
21 specifically as to Paragraph 14 of the declaration.

22 Obviously, the objection is not so much to the
23 declaration, as I understand it, but to the testimony of
24 Dr. Russell if she were to testify to the substance of what is
25 in Paragraph 14. The declaration itself would not be coming in

1 as substantive evidence of a prior statement of this witness.
2 Presumably, it would be consistent with what the witness is
3 testifying to.

4 So, beginning with relevance, as I said before, given that
5 one of the themes of plaintiff's case is that she believed that
6 Dr. Hsu, as relevant here, provided substandard care and had
7 made reports to individuals within the Dartmouth Health system.
8 With respect to Dr. Porter's theory of the case, I find that
9 the substance of Paragraph 14 is relevant because it is
10 commentary on an incident in which Dr. Hsu is alleged to have
11 provided substandard care.

12 With respect to there was a hearsay objection in there,
13 and I interpreted the hearsay objection to be to a statement
14 that the patient, this particular patient may have made to
15 either Dr. Hsu, or probably more relevant here, to Dr. Russell
16 when the proffer is that Dr. Russell responded and provided
17 care to this particular patient. So under Rule 803.4 any kind
18 of a statement made by a person in connection with treatment or
19 diagnosis is not hearsay. So, with respect to that issue, I
20 don't think that is a hearsay issue.

21 Turning then to the question of prejudice, so under Rule
22 403 the rule provides that the court may exclude relevant
23 evidence if its probative value is substantially outweighed by
24 a danger of one or more of the following. As relevant here,
25 the argument is unfair prejudice.

VOLUME: 7
PAGES: 222-431

1 So Rule 403 is a rule of inclusion, not a rule of
2 exclusion, as a general matter. Courts are directed to or
3 directed that exclusion under 403 is an extraordinary remedy
4 that should not be lightly undertaken. So I am going to permit
5 Dr. Russell to testify to the substance of Paragraph 14, but
6 there is going to be a limitation on it.

7 So the last two sentences, I believe, in Paragraph 14
8 where the statement is made, "If Dr. Hsu had been able to
9 connect the dots between the medical history and the need for a
10 consult, the tragedy could have been avoided". So I do think
11 the defendants are correct here that, while Dr. Russell does
12 have a certain level of expertise because of her training to
13 speak to this issue, I'm not going to let her testify to this
14 ultimate issue of causation as to that this would not have
15 happened but for her opinion here.

16 So the incident can be spoken about. Dr. Russell
17 obviously can talk generally about the history of thyroid
18 issues as relevant perhaps to risk factors and the conclusion
19 that this particular pregnancy was unsuccessful, but it should
20 stop basically at that point. Is that clear, Ms. Nunan?

21 ATTORNEY NUNAN: That is clear. I would like an
22 opportunity to just go and explain that to Dr. Russell so we do
23 not cross that line. I have not been speaking to witnesses of
24 any substance before, and I just want to make sure. I'm going
25 to go speak to her.

VOLUME: 7
PAGES: 222-431

1 THE COURT: You must do that, in fact. You'll have
2 to advise your witness that that is the limitation, and please
3 be clear about that. Yes?

4 ATTORNEY SCHROEDER: Your Honor, may I just be heard
5 on one point?

6 THE COURT: Yes.

7 ATTORNEY SCHROEDER: If you go two lines above that,
8 so it says, "Dr. Hsu failed to connect the dots with this
9 patient's medical history, failed to bring in a specialist for
10 a consult before getting the patient pregnant". One, it says
11 "connect the dots" again, which was one of the things that you
12 said was stricken or should not be spoken about. But, two, it
13 goes to the same issue, and I would submit that that line,
14 "Dr. Hsu failed to connect the dots", is the same as, "if
15 Dr. Hsu had been able to connect the dots". It's actually even
16 more declarative.

17 So I would ask -- I just want to be really clear and
18 understand the scope of the inquiry that I would submit, Your
19 Honor, that the two lines, the two sentences above that should
20 also be excluded from any examination.

21 THE COURT: Okay. So the line that you mentioned,
22 the failure to connect the dots line, the clause after that
23 after the comma, "failed to bring in a specialist for a
24 consult", so what's the objection to Dr. Russell potentially
25 testifying that, to her knowledge, a specialist was not brought

1 in for a consult in this case? Which doesn't go to causation,
2 right? Doesn't -- she's not opining on any kind of ultimate
3 issue here.

4 ATTORNEY SCHROEDER: I think she's -- one, we don't
5 even know when she actually looked at these records and whether
6 or not that was accurately reflected in his charts. So we
7 don't know that for sure. There are no charts here. And fail
8 -- so I don't know that she can make that declarative
9 statement. That goes to the issue of causation like, Well, he
10 didn't do this; he didn't do that. Well, I don't know. She
11 doesn't know that, first of all, and I don't know the temporal
12 proximity or lack thereof between when this individual became
13 pregnant and when she happened to see this individual after the
14 fact for hypertension for whatever reason.

15 THE COURT: So earlier in that paragraph, though, she
16 references the standard of care, which she appears qualified to
17 opine on, and she says, "The standard of care is to send a
18 patient with this history to a specialist like me". So then,
19 if she were to testify simply to the fact that a specialist --
20 I assume that's the consult -- did not occur here, that seems
21 consistent with what was above.

22 ATTORNEY SCHROEDER: I'm not in any way suggesting,
23 Your Honor, that she is not a very qualified maternal fetal
24 medicine doctor, but she did not see this patient before she
25 became pregnant, so how can she opine on what actually happened

1 back then?

2 THE COURT: So now you are objecting from the, like
3 you did initially? You want none of this to come in is what
4 I'm hearing. I mean, I've kind of ruled on that already.

5 ATTORNEY SCHROEDER: I understood that. I was just
6 trying to respond here.

7 THE COURT: You are, but --

8 ATTORNEY SCHROEDER: Fair enough.

9 THE COURT: -- you're responding and expanding.

10 ATTORNEY SCHROEDER: Well, yes, Your Honor, I did. I
11 think the, my main issue, Your Honor, or the main issue is that
12 Dr. Hsu failed to connect the dots with this patient's medical
13 record, and he failed to bring in a specialist for a consult
14 before getting the patient pregnant. I don't know where that
15 would -- how could I cross her on where there's no evidence
16 that that's actually true? I don't -- there's no document.
17 There's no -- I have no idea when it happened.

18 And so I was only speaking about those two, those two
19 sentences because it goes to causation. It goes to whether or
20 not -- she's basically, after the fact, doing her own
21 investigation and saying, Well, I would have done it this way,
22 or he should have done this.

23 THE COURT: Well, if the question is asked on direct,
24 Did you call, how do you -- well, if the question is asked to
25 her, Do you know if Dr. Hsu called in a consulting physician,

VOLUME: 7
PAGES: 222-431

1 and the answer is, Yes, I know he didn't, then you can come up
2 and ask, Well, how do you know that, right?

3 ATTORNEY SCHROEDER: I think I could, Your Honor, but
4 I guess I would submit -- I would first say that we know just
5 based on this back-and-forth that she did not treat this
6 patient before she became pregnant. We know that based on this
7 paragraph. So how is it definitive that she can say, well, she
8 didn't get a consult? I don't know that every consult that's
9 ever given is recorded. I mean, I'd like it that -- any time
10 that Ms. McDonald or Ms. Martinez came into my office to ask me
11 something, I don't bill for that time. I mean, it's the same
12 thing.

13 THE COURT: Okay. So I'm going to, as I said, I'm
14 going to allow Dr. Russell to testify as to the incident. The
15 failure to connect the dots, to the extent that it's about
16 causation, right, like Dr. Hsu failed to connect the dots with
17 this patient's medical history, I don't think Dr. Russell
18 should be questioned on that.

19 And, as I've already stated, the line below that about the
20 causation issue, that this would not have happened had the dots
21 been connected between the medical history and the need for a
22 consult, but the general question about whether Dr. Russell is
23 aware that a consult had occurred, I'll allow that question to
24 be asked. So, Ms. Nunan, I'll give you an opportunity to speak
25 to your witness just about this particular instruction, and

VOLUME: 7
PAGES: 222-431

1 then, when you come back in, we'll call the jury back.

2 ATTORNEY NUNAN: Yes.

3 (Brief pause.)

4 ATTORNEY VITT: I have a scheduling issue that maybe
5 we could use the time efficiently and try and get that squared
6 away now.

7 THE COURT: Okay.

8 ATTORNEY VITT: We intend to call Dr. Ira Bernstein,
9 who is the former chair of the OB/GYN department at University
10 of Vermont, MMC, and I thought we were going to move a little
11 quicker today, so he came over and is now waiting outside. We
12 have Dr. Russell. We have Dr. Conroy. And is it possible we
13 could get to him? Yes, it seems unlikely, but I don't want it
14 to be a situation where it's, you know, 10 minutes of 4:00 and
15 how long -- we can probably get him on in 40 minutes, but I
16 don't want to be in a situation where you're looking at me and
17 saying, Where is your next witness, and I say, Well, I excused
18 him. So that's why I'm up here.

19 THE COURT: Okay. So it's all right. So I guess it
20 all depends on how these witnesses go, right? So what's
21 anticipated for Dr. Russell?

22 ATTORNEY VITT: I would say probably half an hour for
23 direct, maybe a little more.

24 THE COURT: Okay. Probably hard, Mr. Schroeder, for
25 you to predict cross, but maybe you have a sense?

VOLUME: 7
PAGES: 222-431

1 ATTORNEY SCHROEDER: I would say about a half hour,
2 at most, but I would -- I'd say I've got a good amount
3 depending upon what topics go into, and I suspect it would be
4 about a half hour.

5 THE COURT: Okay. So roughly an hour, total, for
6 Dr. Russell?

7 ATTORNEY VITT: And Dr. Conroy.

8 THE COURT: Right. And Dr. Conroy same, same
9 exercise. Is that going to be -- as I understand it, the
10 subject matter for Dr. Conroy is fairly limited.

11 ATTORNEY VITT: It is. I would say probably 15 to 20
12 minutes.

13 THE COURT: Okay. And probably --

14 ATTORNEY SCHROEDER: Two. Don't hold me to it,
15 though, Judge.

16 THE COURT: Two minutes?

17 ATTORNEY SCHROEDER: You know, I'd like to think it's
18 two minutes, I would.

19 THE COURT: And then after that would be
20 Dr. Bernstein. All right. So what is the ask, if any, here?
21 Are you requesting asking for, to let Dr. Bernstein go and, if
22 we are finished at 10 to 4:00, we just end for the day?

23 ATTORNEY VITT: That would be fine by me. I can
24 check and make sure he would be available tomorrow. Let me do
25 that. I think he's available, and let me check.

1 THE COURT: And, if he is available and we have time
2 today, I say we put him on for as long as he can.

3 ATTORNEY VITT: All right.

4 THE COURT: Open to suggestions from the parties.

5 ATTORNEY SCHROEDER: Yeah. I think the only thing
6 with Dr. -- I don't have a problem if we end a little early,
7 Your Honor. I think tomorrow we have three witnesses after
8 Dr. Merrens where I suspect that will only keep my cross, my
9 direct to the scope of the cross because we do intend to call
10 him in our case in chief, which I have communicated to
11 plaintiff's counsel already a couple of times. So I would keep
12 that fairly short.

13 We have three witnesses, though, that are two of whom --
14 well, maybe four potentially, but three, at least. One of them
15 works for us, but the other two don't. No, that's right. One
16 out of three work for us. So I just want to make sure we get
17 them on and off tomorrow afternoon. They're pretty short
18 witnesses. So I just don't want to get backed up tomorrow if
19 we start our case in chief. Because they've told me that we
20 are going to start our case in chief tomorrow, so I've made
21 arrangements for these three witnesses to travel from New
22 Hampshire to here for this reason. So I want to make sure
23 we're not getting jammed up. And, if we had to actually stay a
24 little bit longer, I don't know what the rule is on that, Your
25 Honor, in your courtroom, but tomorrow --

VOLUME: 7
PAGES: 222-431

1 THE COURT: For tomorrow?

2 ATTORNEY SCHROEDER: -- it would be pretty close.

3 You know, tomorrow I'd want to finish the other three. They're
4 very short witnesses.

5 THE COURT: Right.

6 ATTORNEY JONES: I wasn't here when this all started.
7 So did you say you're not going to do a lengthy cross of
8 Dr. Merrens?

9 ATTORNEY SCHROEDER: I do not intend to do that,
10 correct.

11 ATTORNEY JONES: Because you're going to call him
12 later in your case in chief?

13 ATTORNEY SCHROEDER: Yes, yes.

14 THE COURT: Okay. So I'm going to suggest that we
15 keep Dr. Bernstein here. It's already 2:30. We only have two
16 more hours to the trial day. So keep him here, and, if we can
17 put him on, just to make sure that we have enough time for
18 tomorrow's witnesses.

19 ATTORNEY SCHROEDER: Thanks, Your Honor.

20 ATTORNEY VITT: Okay.

21 THE COURT: Are we ready for the jury? Okay.

22 (The Jury enters the courtroom.)

23 THE COURT: Plaintiff may call the next witness.

24

25

1 MICHELLE RUSSELL,

2 having been duly sworn to tell the truth,

3 testifies as follows:

4 THE COURT: Please proceed.

5 DIRECT EXAMINATION BY ATTORNEY NUNAN

6 Q. Dr. Russell, what is your occupation?

7 A. I am a doctor.

8 Q. And where do you work?

9 A. I work at Dartmouth-Hitchcock Medical Center in Lebanon.

10 Q. When did you start there?

11 A. In about 2005.

12 Q. Okay. And which department do you work for?

13 A. I work in the department of OB/GYN, but specifically in
14 the division of maternal fetal medicine.

15 Q. And can you give us a basic description of maternal fetal
16 medicine?

17 A. Sure. I take care of high-risk pregnancies kind of from
18 the very beginning to the delivery of their complicated,
19 high-risk pregnancy and do prenatal diagnosis.

20 Q. And what board certifications do you have?

21 A. I have, I am certified by the American Board of Obstetrics
22 and Gynecology in OB/GYN and maternal fetal medicine.

23 Q. How long have you known Dr. Porter?

24 A. Since I started in about 2005.

25 Q. Almost two decades?

1 A. Um-hum. 20 years.

2 Q. How would you describe Dr. Porter as a physician?

3 A. A very experienced, skilled, compassionate, caring
4 physician.

5 Q. How would you describe her as a colleague?

6 A. A very helpful, collaborative, colleague. She was the
7 type of person whose door was always open, that you could go to
8 if you had a clinical question, that you couldn't answer
9 yourself. She was very easy to collaborate with.

10 Q. What was your understanding of Dr. Porter's noninfertility
11 work at Dartmouth-Hitchcock?

12 A. It was quite extensive. Dr. Porter did a lot of benign
13 gynecologic surgeries for women who perhaps wanted to maintain
14 their reproductive potential but had gynecologic complications
15 such as fibroids, endometriosis, things like that. She also
16 did things like interpreting first trimester ultrasounds,
17 particularly complicated first trimester ultrasounds where
18 pregnancies were implanted in the wrong place like in the
19 cervix or the cornua of the uterus or the fallopian tubes. She
20 was our experienced go-to person for those kinds of things.

21 She also provided services in managing adolescent
22 gynecology. So she had expertise in managing young women with
23 gynecologic problems to preserve their fertility later on in
24 life.

25 Q. So how would you use Dr. Porter and her expertise in

1 ultrasound?

2 A. Sure. So ultrasound interpretation, things like the
3 pregnancy implanted in a dangerous location for the pregnant
4 woman, the pregnancy implanted in the cervix. If we found
5 something like that, Misty would be the person that would help
6 us make that interpretation and sometimes, oftentimes would be
7 the person that we'd collaborate with to manage these
8 complicated pregnancies or a pregnancy in the cesarean section
9 scar, which can be a devastating complication later on in a
10 pregnancy.

11 Q. Why wouldn't you go back to the radiologists for that kind
12 of information?

13 A. Radiologists read ultrasounds, but they don't have the
14 gynecologic expertise to take an ultrasound to the actual
15 clinical management and the expertise in how to go forward with
16 this ultrasound diagnosis.

17 Q. How did you and other OB/GYN generalists collaborate with
18 Dr. Porter as a GYN surgeon?

19 A. So, if I had patients that, say, had a pregnancy
20 complication and had uterine septum that was found at the time
21 of surgery or a patient with recurrent miscarriages or large
22 fibroids, this might be a patient that I would refer to Dr.
23 Porter to manage so that their future pregnancy would be less
24 complicated.

25 The gynecologic surgeons would often work with her as

1 either assistants or have her as an assistant to take them
2 through complicated surgeries preserving a woman's fertility.
3 So many gynecologists can do hysterectomies or myomectomies,
4 but they're not quite so skilled at making sure that the
5 ability to conceive in the future is preserved as somebody like
6 Misty can be.

7 Q. Why would you need to preserve fertility for the future?
8 What are some examples?

9 A. A young woman needing surgery because she has large
10 fibroids or a teenager with a congenital uterine abnormality
11 who wants to go on and have babies at some point later on in
12 their life or imperforate hymens or vaginal septums. It can go
13 on and on.

14 Q. I'd like to turn to the meeting about the closure of the
15 REI division that you attended now.

16 A. Sure.

17 Q. What was your initial reaction or feeling when you heard
18 that the REI division had been closed completely?

19 A. Shocked and in disbelief that that could possibly be
20 happening.

21 Q. When did you attend the meeting of the closure of the REI
22 division?

23 A. It was sometime in May of the year of closure, so just
24 before the closure. It was a large department meeting.

25 Q. Where was it held?

1 A. I think it was in Auditorium A and B, which is a combined
2 auditorium, I believe, that the two were opened up together,
3 and it was a full room.

4 Q. How many people were there?

5 A. Many. It was a full room.

6 Q. And who were the people that attended that meeting; do you
7 remember?

8 A. The meeting was open to all the physicians, the nurses,
9 support staff, secretaries, LNAs.

10 Q. Who from the administration spoke at that meeting?

11 A. I only personally recall Dr. Ed Merrens speaking during
12 that meeting.

13 Q. What question did you ask him during that meeting?

14 A. I asked Dr. Merrens. I said, "I understand why the other
15 two members of the department needed to go, but I don't
16 understand why Misty is being let go as well".

17 Q. Why did you ask that question?

18 A. Because Misty is a valuable colleague, and I couldn't
19 imagine that there was any reason why her job would be
20 terminated.

21 Q. What did Dr. Merrens say in response?

22 A. He said she's on disability.

23 Q. How did his response make you feel?

24 A. I was shocked that this would be the response.

25 Q. Why?

VOLUME: 7
PAGES: 222-431

1 A. Because I didn't think a person could be terminated
2 because of a disability.

3 Q. How did you respond to Dr. Merrens in that meeting?

4 A. I said, "But she's coming back".

5 Q. And your understanding was she was returning from
6 disability and starting to work again?

7 A. That was my understanding. I had seen her. I knew that
8 she was only part-time and that we weren't supposed to bother
9 her or assume her door was as open as it used to be but that
10 she was coming back.

11 Q. Did Dr. Merrens say anything in response to that?

12 A. No, he moved on.

13 Q. When the REI division was closed and Dr. Porter was
14 terminated, could the OB/GYN department have used her services?

15 A. We all could have used her services. We didn't have that
16 person anymore that had the expertise in the unusual early
17 first trimester pregnancies, or where do we send the patients
18 that come into our schedule with recurrent pregnancy losses or
19 with infertility questions or concerns?

20 Q. Was the OB/GYN department already short-staffed in 2017?

21 A. I'm not the administrative person, but, yes, I believe
22 that we were already short-staffed, we'd been short-staffed,
23 and, in fact, since Misty's departure, I can count about eight
24 or nine new hirees. So we were definitely short-staffed.

25 Q. In this trial we have heard about Dr. Porter's splitting

VOLUME: 7
PAGES: 222-431

1 behavior. Have you, did you experience any of that?

2 ATTORNEY SCHROEDER: Objection, Your Honor.

3 THE COURT: Basis?

4 ATTORNEY SCHROEDER: Sequestration of witnesses
5 regarding testimony that has been previously offered.

6 THE COURT: Overruled.

7 BY ATTORNEY NUNAN:

8 Q. I'm going to ask the question again.

9 A. Sure.

10 Q. We've heard about Dr. Porter's splitting behavior, alleged
11 splitting behavior. Have you, did you ever experience that?

12 A. I never experienced that. She was always very helpful for
13 me.

14 Q. I'd like to turn to Dr. Hsu.

15 A. Sure.

16 Q. You said a minute ago, "I could understand why the other
17 two had to go", I think. Is that what you said?

18 A. Um-hum. Yes.

19 Q. I'm sorry. I want to discuss your experience with
20 Dr. Hsu. How did you see him working?

21 A. Where I read ultrasound, still do and did at the time, he
22 would often be in the same room reading ultrasound or finishing
23 up a work from previous consults or patients that he had seen,
24 and, also, he would, the room where the REI nurses sat and
25 worked was right across the hall with open doors from the

VOLUME: 7
PAGES: 222-431

1 ultrasound room.

2 Q. Okay. If you had to describe Albert Hsu as a physician,
3 how would you describe him?

4 A. He was a very nice person, but he lacked clinical skills
5 and lacked knowledge.

6 Q. How long a period of time did you observe Dr. Hsu like
7 this?

8 A. Probably about three years, his duration of hire there.

9 Q. Did you ever hear Dr. Hsu giving medical advice to
10 patients?

11 A. I would occasionally hear him on the telephone, talking to
12 patients on the phone.

13 Q. And what would you think to yourself?

14 ATTORNEY SCHROEDER: Objection, calls for
15 speculation, hearsay.

16 THE COURT: Overruled.

17 THE WITNESS: Overruled? I would often hear what I
18 thought was incorrect medical advice being given to patients or
19 incorrect description of physiology that we often teach medical
20 students.

21 BY ATTORNEY NUNAN:

22 Q. What was your experience with one of Dr. Hsu's negative
23 outcomes?

24 A. If you're talking about the woman that I shared in care
25 with him, I was the maternal fetal medicine rounding on

1 patients that were admitted inpatient for complications during
2 their pregnancy. We all sit down together in rounds, and we
3 talk about patients, and then we individually go to the bedside
4 and interview or discuss kind of what is going on with the
5 patient.

6 This particular patient was admitted at about 26 weeks of
7 pregnancy with hypertension in her pregnancy. She'd achieved
8 her pregnancy through some sort of reproductive technology
9 assistance, and but she was admitted at 26 weeks with
10 hypertension. And so I had heard that her history was
11 significant for thyroid cancer, and, when I went to meet her in
12 the room, I gathered a little more history and learned that her
13 father had also had thyroid cancer. That's a pretty unusual
14 family history, thyroid cancer in two individuals and
15 particularly in a male family member.

16 And so that was a little concerning to me. It didn't sit
17 quite right, and I tried to think about the diagnoses of
18 hypertensive disorders with these thyroid abnormalities, and I
19 went home that night quite concerned and thinking about what
20 was going on, thinking, I'm going to go back and put this
21 together tomorrow. I think I know what's going on.

22 And, when I came in in the morning, unfortunately, she had
23 been delivered the night before for a severe hypertensive
24 episode. And the condition that she had when I started digging
25 through her chart and went back into very old records from when

1 she was a teenager is that she had a condition called multiple
2 endocrine neoplasia, which she wasn't aware of. It was a
3 diagnosis that was made as an adolescent, and that condition
4 comes with the risks of having multiple thyroid endocrine
5 tumors, including adrenal tumors and tumors called
6 pheochromocytomas which can lead to hypertensive conditions.

7 Q. She deliver -- how many weeks was the baby when she
8 delivered?

9 A. 26.

10 Q. Did the baby live?

11 A. For a short period of time.

12 Q. I'd like to move on to David Seifer, Dr. David Seifer.
13 Was your office close to David Seifer's?

14 A. It was the same relationship in that I could hear his
15 discussions with the REI nurses that were across the hallway
16 and occasionally had meetings with him.

17 Q. Did you overhear him from time to time?

18 A. I overheard him discussing with the REI nurses and often
19 had what sounded like disagreements with management with the
20 REI nurses.

21 Q. I'd like to move on to Dr. Porter's termination. When did
22 you see Dr. Porter next after her termination?

23 A. In the end of June, July, during raspberry-picking season.

24 Q. How was she doing?

25 A. Well, we picked raspberries in the berry patch, and across

1 the berry patch we talked about life and how things were going,
2 and she was crying in the raspberry patch. She was very
3 tearful.

4 Q. Did you have her out each year to pick raspberries? This
5 was an annual event?

6 A. I invite her out every year. The patch is always open for
7 her to come out and pick raspberries.

8 Q. How do you think Dr. Porter, based on what you saw, was
9 emotionally impacted by this decision to terminate her?

10 ATTORNEY SCHROEDER: Objection.

11 THE COURT: Sustained.

12 BY ATTORNEY NUNAN:

13 Q. Okay. At this point in the summer, had Dr. Porter been
14 offered a position of employment?

15 A. I believe that was part of our conversation in the
16 raspberry patch, that she had had employment gained at UVM.

17 Q. What were her concerns?

18 A. Oh, being separated from her community, her colleagues at
19 Dartmouth-Hitchcock, her family, the distance of travel from
20 her home in Hanover to Burlington, and not seeing her patients
21 that she helped to get pregnant. That's part of our kind of
22 what keeps us going sometimes is being able to see the people
23 that you've helped periodically.

24 Q. What is rewarding the most for you as a doctor with
25 respect to what you just said?

1 A. Going to the grocery store and seeing the older dad with
2 his two twin sons, wrangling them into the grocery cart when I
3 know that they've had a very complicated pregnancy and that
4 we've taken them through that. He doesn't know that I see him,
5 but I see them. I see them happy.

6 Q. And that's a benefit being in a community that you work
7 and live in?

8 A. That is a big benefit.

9 Q. How was Dr. Porter when you spoke to her that day handling
10 the fact that she'd been terminated?

11 A. I believe she was devastated. She said to me, "I just
12 want my job back".

13 Q. The fact that she had employment, was that not a comfort?

14 ATTORNEY SCHROEDER: Objection.

15 THE COURT: Sustained. Rephrase the question.

16 BY ATTORNEY NUNAN:

17 Q. Sure. How was employment at UVM going to impact her life?

18 A. She was going to have to travel or relocate to have her
19 practice here while her family, her homestead, her husband,
20 were in Hanover.

21 Q. Okay. How was the rest of the OB/GYN department after her
22 termination?

23 A. Quite shook up, actually. The day of that meeting I
24 remember kind of scanning the room and catching the eyes of one
25 of my colleagues who was in tears in the room that this had,

VOLUME: 7
PAGES: 222-431

1 was happening, and afterwards I think we all felt very
2 vulnerable and confused as to why an entire division would be
3 severed from our department.

4 Q. Why would you feel vulnerable?

5 A. Because Misty was such a cherished colleague and a skilled
6 surgeon and a skilled clinician that, if it could happen to
7 her, it could happen to any one of us with little notice.

8 Q. How did the explanation that this was the result of a
9 nursing shortage sit with you?

10 A. It didn't seem believable because there is always nursing
11 shortages. There are nursing shortages now in the OB/GYN
12 department, and yet we don't close the OB/GYN department.
13 There are nursing shortages on the labor floor, and yet we
14 don't close the labor floor. They train people. They recruit
15 nurses. They use traveling nurses.

16 The same thing with the main OR, most of the OR is run by
17 traveling nurses or has been run by traveling nurses, and they
18 don't close those services, service lines.

19 ATTORNEY NUNAN: That's all I have. Thank you.

20 THE COURT: Cross-examination?

21 ATTORNEY SCHROEDER: Thank you, Your Honor, may we
22 approach, brief sidebar?

23 THE COURT: Yes.

24 (Bench conference begins.)

25 ATTORNEY SCHROEDER: I'm sorry. I just want to ask

VOLUME: 7
PAGES: 222-431

1 her -- I don't think this is controversial at all -- whether
2 Misty helped her have a baby through IVF, because my
3 understanding is it was common knowledge that that's true, and
4 I didn't want to take her by surprise with that, but I also
5 want to limit it just to that.

6 ATTORNEY NUNAN: I think that's a HIPAA violation. I
7 would not go there.

8 ATTORNEY SCHROEDER: Well, that's the reason why I
9 wanted to have --

10 ATTORNEY NUNAN: I don't know the answer to that.

11 THE COURT: You said it was not controversial.

12 ATTORNEY SCHROEDER: You got me, Judge. Sorry. Go
13 ahead.

14 ATTORNEY NUNAN: I would not ask her that question.
15 I did not ask her that question. I was, I was very careful
16 because she, I don't think she -- I don't think anyone should
17 go there.

18 THE COURT: Okay. So, when the question was asked
19 earlier today of Dr. DeMars, is it the same question you asked
20 her?

21 ATTORNEY SCHROEDER: It was.

22 THE COURT: So how was the potential HIPAA concern
23 there addressed, with her consent?

24 ATTORNEY SCHROEDER: It was consent before, because I
25 asked her that. In fact, I actually got her consent before I

VOLUME: 7
PAGES: 222-431

1 said it in my opening.

2 ATTORNEY NUNAN: I do not believe there is consent
3 here.

4 ATTORNEY SCHROEDER: Well, understood, but it goes to
5 the issue of bias, obviously, and so is there a way to say that
6 she was a patient of Dr. --

7 ATTORNEY NUNAN: No.

8 ATTORNEY SCHROEDER: Hold on.

9 ATTORNEY NUNAN: Excuse me.

10 ATTORNEY SCHROEDER: I know this to be true. It is
11 apparently common knowledge that she was considered a, quote,
12 and this is what I was told, that she was a department baby.
13 So I'd like -- there's a lot of people that were helped
14 internally at DH by Misty Porter and others in the REI
15 division. She's one of them. It goes completely to her bias.

16 THE COURT: I understand the relevance in terms of
17 bias, but I'm not sure so sure how we get beyond this issue of
18 it's her medical information and there's no consent to ask the
19 question.

20 ATTORNEY SCHROEDER: Okay. But --

21 THE COURT: Right.

22 ATTORNEY SCHROEDER: Could I not ask her, Do you have
23 a physician-patient relationship with her? That doesn't go
24 into anything. That's not a HIPAA violation, asking her that,
25 whether or not she has a physician-patient relationship with

VOLUME: 7
PAGES: 222-431

1 her.

2 THE COURT: To be honest with you, I don't know if
3 that is a HIPAA violation. I'm uncomfortable even kind of
4 opining on it. Maybe it is, maybe it isn't. the other question
5 I have to ask you is, Michelle Russell has been on the witness
6 list for how long?

7 ATTORNEY SCHROEDER: Well, there's 25 people on the
8 witness list.

9 THE COURT: I know, but, if this is part of
10 cross-examination and this was not brought out on direct, so
11 you've thought about this before.

12 ATTORNEY SCHROEDER: No. Actually, Your Honor, I
13 just learned about this a week ago, so I did not know this
14 fact.

15 THE COURT: A week ago?

16 ATTORNEY SCHROEDER: Or maybe a few days ago. Which,
17 well, I think we've been pretty busy the last --

18 THE COURT: So I just don't know what we can do with
19 this now. I mean, you see the pickle that it puts me in?

20 ATTORNEY SCHROEDER: I understand.

21 THE COURT: And puts you in and puts everyone in.

22 ATTORNEY COFFIN: There HIPAA are exceptions that
23 cover situations where people are called to testify in hearings
24 or for government proceedings. I'm not sure whether that
25 exception applies or not here. I have to say it would seem to

1 me it would be a question about whether this is an issue that
2 is actually put an issue by the question, and, to me, it's a
3 question of how closely the claim of bias from this association
4 is by keeping this matter from the jury, and I think there is
5 an exception that would apply to provide medical testimony in
6 court hearings. But so I don't think that fully answers the
7 question.

8 THE COURT: Right.

9 ATTORNEY COFFIN: But what it unfortunately raises is
10 another question, and, you know, I think the parties are going
11 to be heard and the Court decide, you know, kind of the level
12 of degree to which that issue is in play here.

13 ATTORNEY JONES: I was just going to say that her
14 condition and her patient relationship has not been placed in
15 issue. I don't think there's a single HIPAA exception in play
16 here. So it's, this is just anybody working in the health care
17 field, people understand that this is simply a no-go zone
18 without patient consent. I don't think that's an open
19 question.

20 ATTORNEY SCHROEDER: Actually, I --

21 ATTORNEY JONES: I don't think we need to research in
22 this case.

23 ATTORNEY COFFIN: What I was going to say, I don't
24 know what your view on that is, but I thought that the question
25 about whether it was a physician-patient treating relationship

VOLUME: 7
PAGES: 222-431

1 is not private medical information and probably would be --

2 ATTORNEY JONES: Just like the attorney-client
3 relationship context, the ethics rules make it clear even
4 revealing an attorney-client relationship is a violation of the
5 rules. It's the same thing. Yes, it is.

6 ATTORNEY SCHROEDER: HIPAA is separate.

7 ATTORNEY JONES: I understand, but it's the same
8 concept.

9 ATTORNEY SCHROEDER: I was trying, Your Honor, and,
10 by the way, I've got, like, 200 people in the health care
11 department, so I reject the idea that somehow you're an
12 authority on the health care issue, but, on this point, Judge,
13 asking just that question, Do you have a physician-patient
14 relationship, it goes to the relationship and just leave it
15 there. I'm --

16 THE COURT: It does, but I don't know if that's, if
17 that's an okay question to ask. And I hear Mr. Coffin's point.
18 Maybe it is an exception. But, without any kind of authority
19 that lets me kind of know that for a fact, I'd be very
20 reluctant to allow questioning into this particular area. I
21 hear your point about bias and everything else, I do. But,
22 without some kind of authority that tells me that kind of
23 question is not some type of violation of HIPAA, I'm not going
24 to allow it.

25 ATTORNEY NUNAN: Okay.

1 ATTORNEY SCHROEDER: Okay, okay. Thank you.

2 THE COURT: All right. Thank you.

3 (Bench conference ends.)

4 ATTORNEY SCHROEDER: May I proceed?

5 THE COURT: Yes.

6 CROSS-EXAMINATION BY ATTORNEY SCHROEDER

7 Q. Thank you, Your Honor. Good afternoon, Dr. Russell.

8 A. Good afternoon.

9 Q. You and I have never met before, right?

10 A. No.

11 Q. Okay. Checking.

12 THE COURT: Dr. Russell, I'll just ask you to keep
13 your voice up, please.

14 THE WITNESS: Sure.

15 BY ATTORNEY SCHROEDER:

16 Q. Thank you. That was going to be my next point, but thank
17 you. You have known Dr. Porter for about 20 years?

18 A. Correct.

19 Q. And have you become friends outside of work as a result of
20 that?

21 A. Work colleagues and friends across the raspberry patch.

22 Q. Okay. And you mentioned raspberry patch, and you
23 mentioned the fact that -- would she come over from time to
24 time?

25 A. Just for picking raspberries.

VOLUME: 7
PAGES: 222-431

1 Q. Okay, all right. But would she come over for that purpose
2 to your house?

3 A. Yes, she came and picked raspberries, yes.

4 Q. Okay. By the way, for everyone's edification, what is the
5 actual season for raspberries?

6 A. End of June, early July. And I wasn't always there. She
7 would often pick raspberries without me in my raspberry patch.

8 Q. Okay. And how long does that season last?

9 A. About two weeks.

10 Q. Okay. Pretty short season?

11 A. Yeah.

12 Q. So, on occasion over the years, she would come over to
13 your house to pick raspberries, whether you were there or not?

14 A. Correct.

15 Q. And do you text with her on occasion?

16 A. Just to say, The raspberries are in. I'm not going to be
17 there. You're welcome to come and get them so they don't fall
18 off the vine.

19 Q. Okay. And you specifically recall having a discussion
20 with her in July, August of 2017?

21 A. June, July of 2017, Yes.

22 Q. June, July. I'm sorry.

23 A. Yeah, that's all right.

24 Q. And she came over to your house?

25 A. Correct.

1 Q. And you guys were together for a little bit that
2 afternoon --

3 A. Correct.

4 Q. -- whenever that was in June or July? The subject of the
5 OB/GYN meeting came up, correct?

6 A. Correct, or, not of the meeting, but of the department
7 closure.

8 Q. Right. And you discussed the department closure with her?

9 A. Correct.

10 Q. And you discussed, you discussed the OB/GYN meeting at
11 some point during that conversation, did you not?

12 A. I don't think so.

13 Q. Okay. Would you be surprised to know that Dr. Porter has
14 sworn under oath that that conversation happened during that
15 meeting?

16 A. It might have. It was a conversation back and forth about
17 what had gone on and the department closure.

18 Q. Okay. And so you're not sure exactly whether or not the
19 OB/GYN department meeting came up?

20 A. I don't know if, in the raspberry patch, the OB/GYN
21 department meeting came up, but it might have because it was
22 part of the whole closure and loss of job.

23 Q. Right. And the REI division closed May 4th. It actually
24 shut down June 3rd, and then there was the meeting with the
25 OB/GYN department happened sometime in that timeframe?

1 A. Correct, yes.

2 Q. So it was fairly recent, right?

3 A. Yes.

4 Q. And would you be surprised to know that Dr. Porter does
5 not say anything about this comment with respect to that
6 particular raspberry patch discussion that she had with you,
7 the specific comment you attributed to Dr. Merrens?

8 A. Can you rephrase that? I don't exactly know what you're
9 asking.

10 Q. Okay. You had a, we'll call it, raspberry patch
11 get-together?

12 A. Correct.

13 Q. Okay.

14 A. Sure.

15 Q. Just the two of you, right?

16 A. Well, my daughter, yes.

17 Q. She's important. And you guys got together in the
18 raspberry patch, and my question was, Would you be surprised if
19 Dr. Porter had, in her written responses in this case, stated
20 nothing about this comment about, that you attributed to
21 Dr. Merrens?

22 A. No, I wouldn't be surprised by that because I would have
23 felt uncomfortable telling her that.

24 Q. You would have felt uncomfortable telling her that?

25 A. I probably would have felt uncomfortable saying that I had

VOLUME: 7
PAGES: 222-431

1 heard that comment from Dr. Merrens.

2 Q. How many people were in this room when that comment was
3 made?

4 A. It was a whole crowd of people. I don't know. 50, maybe,
5 or more.

6 Q. Were you aware that you're the only one that's testified
7 to this specific comment as of now?

8 A. I asked it, and I --

9 Q. You asked a comment about her being on disability, did you
10 not?

11 A. I asked the comment about why was she being let go with
12 the other two gentlemen that I felt reasonable reasons for
13 termination, yes.

14 Q. Okay.

15 A. But I did not ask her, I did not ask about disability.
16 That did not come from me.

17 Q. Okay. But, at the time, just so we're clear, at the time,
18 you knew that Dr. Porter was out on disability, right?

19 A. I knew she was, that she was out on disability, yes.

20 Q. Right. Long-term disability?

21 A. I don't know exactly. I knew that she was out of work. I
22 have no idea about whether she signed paperwork for disability,
23 but I assumed she probably did because it was long-term process
24 that she was out for.

25 Q. Right, long-term disability benefits, right?

1 A. Right.

2 Q. And that's a pretty -- in your experience, do you know
3 anything about long-term disability benefits?

4 A. I have never had them, so no.

5 Q. Okay. But you knew that she had long-term disability
6 benefits at that point?

7 A. I did not.

8 Q. Okay. But you knew that she was out of, out of the office
9 correct on a leave?

10 A. Correct.

11 Q. Okay. And, in fact, during that time, July or June, July
12 of 2017, do you recall the fact that she had to go out to the
13 Mayo Clinic for a series of visits?

14 A. I heard that at some point, but I don't think I knew about
15 it at the time, but I heard it at some point that she had gone
16 out to the Mayo Clinic.

17 Q. And were you aware at that point in the summer of 2017
18 that she was still experiencing symptoms related to her
19 condition?

20 A. Yes. I believe that she was still in the process of
21 recovering from her condition that had led to her disability,
22 that she was still having treatment for it.

23 Q. And you're aware of the fact that she then had to have a
24 second surgery in the fall of 2017?

25 A. I didn't know all of these details before. I am aware of

VOLUME: 7
PAGES: 222-431

1 it now, but I did not know that at the time.

2 Q. Fair enough. Give me second, Your Honor. Just want to
3 see if I can expedite this.

4 In terms of your role, Dr. Russell, you are a physician in
5 the maternal fetal medicine division of OB/GYN, correct?

6 A. Correct.

7 Q. And you are, that's a separate division from what was the
8 REI division, correct?

9 A. Yes. The OB/GYN encompasses several divisions, including
10 maternal fetal medicine and reproductive endocrinology.

11 Q. And so you didn't have any oversight responsibility for
12 the REI division at any point, correct?

13 A. No.

14 Q. And you haven't had -- you do not currently have a
15 management role at Dartmouth Health, correct?

16 A. I do not.

17 Q. And, in the relevant timeframe of September of 2016 and
18 2017, you did not have a management role at Dartmouth Health?

19 A. I've never had a management role or administrative role at
20 Dartmouth Health.

21 Q. Okay. Prior to today, you met with plaintiff's counsel to
22 prep for your hearing today?

23 A. I was asked by the plaintiff's counsel to come here, yes.

24 Q. Right. And you spoke with them?

25 A. Yes.

VOLUME: 7
PAGES: 222-431

1 Q. All right. And, in this case, you did, in fact, sign
2 paperwork related to the case, correct, at some point earlier?

3 A. I believe so.

4 Q. Okay. And that was at the direction of plaintiff's
5 counsel, correct?

6 A. Correct.

7 Q. In terms of responsibility for hiring and firing and
8 reassignment, those management decisions, you never had any
9 oversight over those, correct?

10 A. No.

11 ATTORNEY SCHROEDER: Okay. Just give me one second,
12 Your Honor.

13 THE COURT: Yes.

14 ATTORNEY SCHROEDER: Nothing further, Your Honor.
15 Thank you. Thank you, Dr. Russell.

16 THE COURT: Any redirect?

17 ATTORNEY NUNAN: None.

18 THE COURT: Okay. You may step down. Thank you.
19 Plaintiff may call its next witness.

20 ATTORNEY VITT: Joanne Conroy.

21 JOANNE CONROY,

22 having been duly sworn to tell the truth,
23 testifies as follows:

24 DIRECT EXAMINATION BY ATTORNEY VITT

25 Q. Good afternoon, Dr. Conroy. Are you the CEO of Dartmouth

1 Health?

2 A. Yes, I am.

3 Q. And I believe you became CEO in August of 2017?

4 A. That's correct.

5 Q. The decision to close the REI division and terminate the
6 doctors who worked there was made before you became the CEO?

7 A. That's correct.

8 Q. You were aware of the decision when you took the position
9 of CEO?

10 A. No, I was not.

11 Q. Did you learn about it shortly after becoming CEO?

12 A. No, I did not.

13 Q. When did you learn that the REI division had been closed?

14 A. In a brief touch-base meeting with Dr. Ed Merrens probably
15 in the first month of my tenure.

16 Q. So roughly in August of 2017?

17 A. Probably.

18 Q. Okay. And you say a touch-base. Was that just a brief
19 get-together, or what was the nature of the --

20 A. We used to meet about 30 minutes, you know, every week,
21 every two weeks just to discuss high-level issues that were
22 going on across Dartmouth-Hitchcock, and my expectation would
23 have been it would have been mentioned within one of those
24 brief meetings.

25 Q. Okay. And I think you told me in your deposition that the

VOLUME: 7
PAGES: 222-431

1 session on the REI division closure took maybe five minutes.

2 That sound right?

3 A. Correct.

4 Q. Okay. You're an anesthesiologist; am I correct?

5 A. That's correct.

6 Q. You have no expertise, I believe, in reproductive
7 endocrinology; is that right?

8 A. I do not.

9 Q. You're aware, I believe, that that is a subspecialty of
10 OB/GYN?

11 A. I am.

12 Q. In a large hospital like Dartmouth-Hitchcock Medical
13 Center, it's kind of inevitable that, on a regular basis,
14 you're going to be getting women and young girls showing up who
15 have the need for somebody who has the specialty in
16 reproductive endocrinology?

17 ATTORNEY SCHROEDER: Objection.

18 THE COURT: Basis?

19 THE WITNESS: It would be speculation.

20 THE COURT: I'll direct the Witness not to answer the
21 question until the objection has been ruled on.

22 ATTORNEY VITT: Let me rephrase the question.

23 THE COURT: So that objection is sustained.

24 BY ATTORNEY VITT:

25 Q. Okay. And I'm going to rephrase the question. When

VOLUME: 7
PAGES: 222-431

1 Dartmouth-Hitchcock had an REI division, did it have, in that
2 REI division, doctors who had a specialty in reproductive
3 endocrinology?

4 A. I am not aware of that. That was a decision made to close
5 the division before I came.

6 Q. Have you worked in hospitals that had a reproductive
7 endocrinology section or division?

8 A. My previous large facility was in Morristown, New Jersey,
9 and our fertility services were managed by a private practice
10 across the street from the hospital.

11 Q. All right. So I want to make sure I've got this right.
12 You are unsure whether Dartmouth-Hitchcock has ever had a
13 division that was staffed by doctors who were specialists in
14 reproductive endocrinology; is that what you're telling me?

15 A. No. Let me rephrase myself.

16 Q. Okay.

17 A. I do not know the specifics of the division. My
18 expectation is there probably was a division, since that is the
19 question at play here. The division was closed before I came
20 there. My previous experience of those services were offered
21 by private practitioners outside the facility.

22 Q. That wasn't the situation at Dartmouth-Hitchcock Medical
23 Center, right? You had, on the staff, doctors whose job it was
24 to provide health care in connection with the reproductive
25 health of women and girls, right?

1 ATTORNEY SCHROEDER: Objection, argumentative, asked
2 and answered.

3 THE COURT: Overruled. The Witness may answer if she
4 knows.

5 THE WITNESS: If they had that division, I don't have
6 any specific personal knowledge of it, and it was there and
7 then closed before I arrived there.

8 BY ATTORNEY VITT:

9 Q. What's your understanding of the specialty of the doctors
10 who would work in a reproductive endocrinology division?

11 A. I would be speculating. I'm an anesthesiologist. I put
12 them to sleep and wake them up.

13 Q. All right. I understand, I understand the anesthesiology
14 part. That, I've got, but I want to make sure. You're saying
15 that, when Dartmouth-Hitchcock had a reproductive endocrinology
16 division, you have no idea of the specialty of the doctors who
17 were working there?

18 A. You know what? I can tell you from my perspective as an
19 anesthesiologist. We all are board-certified in anesthesia,
20 but many of us have subspecialties in obstetric anesthesia,
21 transplant anesthesia, or cardiac anesthesia. It's not
22 uncommon for primary certification to have subspecialties. I
23 do know in OB/GYN nationally they have many specialties, just
24 like anesthesia does. They're certified in OB/GYN, but they
25 subspecialize in certain areas, and reproductive endocrinology

VOLUME: 7
PAGES: 222-431

1 is one of them. But, if you're asking me about specifics at
2 Dartmouth-Hitchcock, that service was closed before I was
3 there.

4 Q. Do you recall that you provided or were available for an
5 interview with two local papers?

6 A. Yes.

7 Q. One would be the "Valley News" and the other "Concord
8 Monitor", correct?

9 A. I don't believe the "Concord Monitor" --

10 Q. All right.

11 A. -- interviewed me.

12 Q. So the interview was from the "Valley News"?

13 A. The interview was from the "Valley News".

14 Q. And that's the, kind of the paper for the local area
15 around Lebanon and into Vermont, right?

16 A. They have a subscriber basis 12,000, yes.

17 Q. How do you know it has a subscriber base of 12,000?

18 A. I make it my business to know.

19 Q. Okay. Excuse me a second. So, other than the briefing
20 that you received from Ed Merrens, did you have any information
21 about the reason that the REI division at Dartmouth-Hitchcock
22 was closed?

23 A. Other than my conversations with Ed Merrens?

24 Q. You're quoted as saying that there was a, quote,
25 "declining birth rate in the area, which made it less

1 attractive for up-and-coming providers". Do you recall saying
2 that?

3 A. That was a generalization. Yes, I do recall saying that,
4 but that was a generalization that applied to some of the
5 challenges in rural health care, especially in New Hampshire
6 and Vermont where we have declining birth rates and it's hard
7 to attract nurses, physicians, technicians to serve in a
8 practice that has inadequate volume for them to have a vibrant
9 practice.

10 Q. You added that, "Young providers want to join a thriving,
11 growing practice". Do you recall that?

12 A. Yes.

13 Q. Okay. Providers normally refers to doctors and nurse
14 practitioners. Is that what you meant?

15 ATTORNEY SCHROEDER: Objection, Your Honor. Sidebar?

16 THE COURT: Yes.

17 (Bench conference begins.)

18 ATTORNEY SCHROEDER: I understand this is
19 cross-examination. If he's going to ask, he's summarizing
20 quotes which are not actually fully accurate from the article.
21 Whether or not they actually are, are actually accurate quotes
22 as well is another issue, but, if he wants to ask her about the
23 question, that's fine, but he's trying to put words in her
24 mouth. Isn't it true that you -- there's no foundation.

On top of that, he is summarizing what was said in the

VOLUME: 7
PAGES: 222-431

1 article. If he wants to ask her about what was said, what she
2 was interviewed about, and what she is quoted on, that's fine,
3 but he can't summarize and say, Well, that's what you said.

4 THE COURT: Is there a reason why the article is not
5 in evidence? Is it going to be in evidence?

6 ATTORNEY VITT: I think it will be in evidence. In
7 fact, we have to provide the foundation, I think, to get that
8 other document in, but what I was quoting from was the
9 deposition where it was actually, in the deposition, referred
10 to as the quote, and she says, Yes, that's what I said.

11 THE COURT: I thought you were quoting from the
12 article.

13 ATTORNEY VITT: Well, the deposition quotes the
14 article, and then so I thought, Well, she's already testified
15 under oath, and, if necessary, I can show it to you, to her,
16 but she agreed with me.

17 THE COURT: So, of course, the issue is about the
18 accuracy of the quotation. I'm wondering if you should just
19 introduce the article. Not telling you what to do. This is
20 your case. Is that what you planned on doing? Because that
21 might resolve this particular issue with respect to questions
22 about putting words in her mouth. It's a cross-examination.

23 ATTORNEY SCHROEDER: Understood, but he was getting
24 ready to ask a question, which was the reason for the
25 objection, which actually contradicts her deposition testimony.

VOLUME: 7
PAGES: 222-431

1 So he can't have it both ways. If he wants to use the
2 disposition to impeach her, that's fine, but don't ask a
3 question that actually is contradictory to what she actually
4 testified to.

5 And, secondly, you talked about the Court and us, defense
6 counsel, both interpreted that he was quoting from the article,
7 not from her deposition transcript. If he wants to quote the
8 deposition transcript, I would respectfully submit that he
9 needs to actually put it in front of her. We went through this
10 exercise before of showing her the deposition transcript and
11 then impeaching her.

12 THE COURT: Is the quotation in the deposition
13 transcript taken straight from the article that you're
14 referencing?

15 ATTORNEY VITT: I believe so, Judge, but I'll tell
16 you what. I'm pretty sure I'm right, but I'm perfectly happy
17 to show her the deposition. Here's what the deposition says.
18 You agreed with me. But, just to move this along, I'm happy to
19 show her the deposition where she --

20 THE COURT: This now circles back to the discussion
21 we had earlier today about using the deposition transcript for
22 impeaching her, not refreshing her recollection.

23 ATTORNEY VITT: Well, I wasn't planning -- look, I
24 wasn't planning to use it, but Mr. Schroeder basically said I
25 misquoted her, this is somehow inaccurate. I'm willing to do

1 it with her the easiest way, Judge. I'm just trying to -- I'm
2 surprised we're stuck on this point. She talks about young
3 providers. That is the term she uses in the deposition. She
4 talks about, you know, providers. All I was saying is
5 providers normally means doctors and nurse practitioners. I
6 understand that she wants to expand it to include nurses, so be
7 it.

8 ATTORNEY SCHROEDER: She testified to that in her
9 deposition. And the bigger issue is you were just telling us
10 that you were quoting from her deposition. I actually thought
11 you were quoting from the article. I just want it to be an
12 accurate quote. That's it. If you want to impeach her on the
13 deposition, go right ahead, but her deposition actually says
14 providers includes nurses. I can actually give you the page
15 and quote for that.

16 THE COURT: Reading from the deposition, I think, is
17 not appropriate. Reading from the deposition, I don't think,
18 would be appropriate here, just as offering that as kind of
19 evidence that's not being used to impeach. So, if the debate
20 here is about the accuracy of the quotation you're attributing
21 to Dr. Conroy, I'm wondering if the article is the way to go.

22 ATTORNEY VITT: Let me see if I can put my hands on
23 the article. All right, fine.

24 THE COURT: Okay.

25 (Bench conference ends.)

VOLUME: 7
PAGES: 222-431

1 ATTORNEY VITT: Do we have this? We'll start with
2 publishing to you and to the clerk and then, assuming that
3 we've got agreement, we'll move its admission. It's
4 Plaintiff's Exhibit 109.

5 THE COURT: Okay. Is that on your screen,
6 Dr. Conroy?

7 THE WITNESS: I can see the screen.

8 BY ATTORNEY VITT:

9 Q. I just want to make sure it's there. Is this the article
10 that you were referring to before that appeared in the "Valley
11 News"?

12 A. Yes.

13 ATTORNEY VITT: I think, rather than spend much time
14 on it, I'd like to move for the admission of the article.

15 THE COURT: Okay. Any objection?

16 ATTORNEY SCHROEDER: No objection, Your Honor, if we
17 could put a copy in front of Dr. Conroy.

18 ATTORNEY VITT: She has it on her screen, I think.

19 ATTORNEY SCHROEDER: That's just the first page. I
20 think it's separate pages.

21 THE COURT: So then Plaintiff's 109 is admitted.

22 ATTORNEY VITT: May I approach the Witness?

23 THE COURT: Yes.

24 BY ATTORNEY VITT:

25 Q. I'm going to show you what's been marked as Exhibit 109.

1 Would you take a look at that and tell me if that's entire
2 article?

3 A. Yeah, seven pages.

4 Q. Do you recall saying that the declining birth rate in the
5 area made it less attractive for up-and-coming providers to
6 come to this area?

7 A. Yes.

8 Q. And I believe you also indicated that young providers want
9 to join a thriving, growing practice, correct?

10 A. Yes. However, that would apply to any practice.

11 Q. Okay. By providers do you mean doctors and nurse
12 practitioners?

13 A. Nurses, technicians, every single health care
14 professional.

15 Q. How do you know that young providers who are interested in
16 reproductive endocrinology want to join a thriving, growing
17 practice?

18 A. Everyone, when they start their career, wants to achieve
19 mastery, and mastery is achieved with close to 10,000 hours of
20 work in the specialty of their choice. Writ large across
21 Dartmouth Health, we have a harder time recruiting
22 professionals from all walks simply because they're not joining
23 practices where they can quickly achieve mastery, meaning it
24 takes much longer to really become outstanding in their field
25 and really well-known across the region and across the country.

1 Q. Are you aware that the University of Vermont Medical
2 Center has an REI division within its department of OB/GYN?

3 A. I know that.

4 Q. You do know that? Okay. And is the birth rate around the
5 Burlington area any different than the birth rate around the
6 Lebanon, New Hampshire area?

7 A. Well, actually Chittenden County is quite populated. We
8 are the most rural academic medical center in the country. We
9 have only 130,000 people within 30 miles of Lebanon. I believe
10 Chittenden County has far more people in their county.

11 Q. So do you think that that distinction makes it easier for
12 them to recruit than Dartmouth-Hitchcock?

13 A. I would be speculating.

14 Q. When you're talking about a thriving practice in this
15 area, what is the nature of the services that you're talking
16 about that are provided by the doctors?

17 A. Could you clarify?

18 Q. Sure. One of the things that an REI division might do is
19 provide IVF services, right?

20 A. We are outside my area of expertise, but I expect they do.

21 Q. Do you have any sort of concept -- and I didn't mean it
22 use necessarily that term -- some grasp of the scope of the
23 work done by an REI division?

24 A. I have some understanding from my experience at Morristown
25 Memorial Hospital in northern New Jersey when the private group

VOLUME: 7
PAGES: 222-431

1 across the street did both assessment of fertility, some
2 reproductive endocrinology, as well as harvesting and
3 implanting of fertilized embryos.

4 Q. So is it your understanding that the scope of the practice
5 at Dartmouth-Hitchcock was roughly as you just described it?

6 ATTORNEY SCHROEDER: Objection.

7 THE COURT: Overruled.

8 THE WITNESS: That is my basic knowledge. I have not
9 reality checked it against the activities at
10 Dartmouth-Hitchcock, which were the service which was closed
11 before I came there.

12 BY ATTORNEY VITT:

13 Q. Do you recall that Leslie DeMars asked you to meet and
14 discuss precisely the topics that were covered in that
15 interview?

16 A. I was meeting with Leslie DeMars the first time as a new
17 chair. When I came to Dartmouth, I tried to meet with all the
18 chairs, and she, at that time, was the chair of OB/GYN, and
19 that is why I met with her.

20 Q. In that meeting did she tell you that she hoped you had
21 been misquoted because the information that you provided in the
22 interview was completely untrue?

23 A. Our first meeting she was distressed and almost
24 noncommunicative and nearly in tears. She was obviously
25 struggling with some leadership challenges. We ended that

VOLUME: 7
PAGES: 222-431

1 interview in my office in less than 30 minutes. I was
2 concerned enough about her well-being that I asked to have
3 coffee with her the next week to make sure she was okay. We
4 did not talk about the reproductive endocrinology division or
5 IVF services in either of those meetings.

6 Q. All right. Did she say anything to you in either of those
7 meetings to the effect that the description that you provided
8 about the reason for the closure, closing of the REI division
9 was inaccurate or mistaken in any respect?

10 A. She did not.

11 Q. When you received the briefing from Ed Merrens, did he
12 indicate to you that, for a period of over probably 25 years,
13 Dartmouth-Hitchcock in the OB/GYN department had provided IVF
14 services to women?

15 A. Our conversation was brief.

16 Q. Right.

17 A. It was less than five minutes. The steps that he and
18 other colleagues took to thoughtfully evaluate whether or not
19 they could continue to offer those services, the decision was
20 "no" and how they were actually executing on closing that
21 service. That was the limit to our conversation, which was
22 probably less than five minutes.

23 Q. I believe you provided information or testified that
24 Dartmouth-Hitchcock now uses Boston IVF to provide reproductive
25 endocrinology instruction to its residents, correct?

1 A. That is my understanding.

2 Q. Okay. And I think you indicated that residents now go to
3 the Catholic Memorial. What's the hospital?

4 A. They used to do their obstetrical training at Catholic
5 Medical Center in Manchester. However, they however they spent
6 two months with Boston IVF to get their experience in
7 reproductive endocrinology.

8 Q. And is it your understanding that's still where they get
9 the reproductive endocrinology instruction is through Boston
10 IVF?

11 A. I have not been informed it's otherwise.

12 Q. So do I correctly infer that you're saying that, as far as
13 you know, that's still the relationship, right?

14 A. No one has informed me that that's changed.

15 Q. No one has informed you? Okay. Has anyone told you that
16 the residents at Dartmouth-Hitchcock get reproductive
17 endocrinology instruction at the University of Vermont Medical
18 Center here in Burlington?

19 A. They have not.

20 Q. And has anyone said to you that the person providing that
21 instruction is Dr. Misty Porter, who is the same person who
22 provided instruction when she was at Dartmouth-Hitchcock?

23 A. They have not.

24 Q. What is it that makes you believe that Boston IVF is capable
25 -- do you believe that Boston IVF is capable of providing

VOLUME: 7
PAGES: 222-431

1 adequate instruction in reproductive endocrinology to the
2 residents?

3 A. In my previous experience of Morristown Memorial Hospital
4 in northern New Jersey, our reproductive endocrinology and IVF
5 experience for our residents was provided by the private group
6 across the street who had a robust practice. One has to
7 consider that, when residents are doing subspecialty training,
8 it is to introduce them to the subspecialty so, as a general
9 obstetrician, they understand when they should refer people to
10 that specialty.

11 If they choose to continue their training, they would then
12 take a fellowship in that subspecialty in order to get
13 additional training, but it is an introduction and making sure
14 that they have the appropriate awareness that they can practice
15 OB/GYN, general OB/GYN effectively.

16 Q. Does Boston IVF do anything other than to provide IVF
17 services?

18 A. I do not know.

19 Q. For example, if you have young girls, women showing up
20 with uterine abnormalities, is that something they deal with?

21 A. I do not know.

22 Q. If they show up with difficulties with abnormal bleeding,
23 is that something they deal with?

24 A. Most of the things that you're talking about would show up
25 in our emergency room.

VOLUME: 7
PAGES: 222-431

1 Q. I was wondering about the instruction that you think
2 they're getting when they go to Boston IVF for reproductive
3 endocrinology.

4 A. I would rely on Ilana Cass, the current chairman of the
5 department of OB/GYN, to make sure that her residents get the
6 appropriate training. She, her program is reviewed on a
7 periodic basis by the American College of OB/GYN to make sure
8 that their training is appropriate and sufficient.

9 Q. When you met with Ed Merrens and you got this briefing
10 about the REI division, that was, what, maybe two months, three
11 months after the REI division was closed, correct?

12 A. It was probably in late August or early September,
13 probably late August.

14 Q. Okay. And were there still ongoing discussions about
15 placement of physicians, nurses, others who had worked in the
16 REI division?

17 A. I do not know.

18 Q. So whatever, when you say you don't know, you don't know
19 whether he said it, or you don't know whether it was, it
20 actually was occurring?

21 A. He did not say anything about that to me, and I have no
22 knowledge whether or not those conversations were continuing.

23 Q. Other than this one five-minute briefing with Ed Merrens,
24 other than that one session, have you had discussions with
25 anyone else at Dartmouth-Hitchcock about the circumstances

VOLUME: 7
PAGES: 222-431

1 leading to the decision to close the REI division?

2 A. No.

3 Q. And what I think I'm hearing you say is, as far as you
4 were concerned, by the time you had the briefing from Ed
5 Merrens, it was done, over, closed. That's in the past, and
6 you were going forward, right?

7 ATTORNEY SCHROEDER: Objection.

8 THE COURT: Sustained.

9 BY ATTORNEY VITT:

10 Q. Did you think that there was any residual issues
11 associated with the decision to close the REI division at the
12 time you spoke to Ed Merrens?

13 A. I had no reason to think that there was any other issue
14 that would require my involvement or attention.

15 Q. So, as far as you were concerned, it was a closed matter,
16 over, done with it, right?

17 ATTORNEY SCHROEDER: Objection, Your Honor.

18 THE COURT: It's the same question. Sustained.

19 BY ATTORNEY VITT:

20 Q. All right. Do you receive -- do you recall receiving a
21 letter from medical students, alumni medical students and
22 residents who had gone through the REI program?

23 A. No.

24 Q. Let me show you a letter, see if this refreshes your
25 recollection. It's a two-page letter addressed to you signed,

VOLUME: 7
PAGES: 222-431

1 I think, by 28 -- and I'll give a copy to --

2 ATTORNEY SCHROEDER: May we approach, Your Honor?

3 THE COURT: Yes.

4 (Bench conference begins.)

5 ATTORNEY SCHROEDER: I haven't seen this document
6 yet, but I can assume that it's not an exhibit on the list and
7 he's just going to throw it in play here, because he wanted to
8 give me a copy. So, therefore, I have to assume it's not on
9 any of the lists. So I would object to any line of inquiry on
10 that. We've talked at length about including all documents
11 that might be exhibits in this case, and I have to assume that
12 this article is from, I don't know, eight years ago. And so,
13 therefore, why he's just bringing it up at 3:40 today, the
14 seventh day of trial, I'd like to understand why before we get
15 into an objection.

16 THE COURT: What is it?

17 ATTORNEY VITT: I'm sorry. What?

18 THE COURT: What is it? What's the document?

19 ATTORNEY VITT: It's a letter from, I think it's 28
20 alums of either medical students who had trained in the REI
21 division or residents who had trained in the REI division to
22 Joanne Conroy talking about the circumstances leading to the
23 closure of the REI division.

24 THE COURT: That wasn't part of the deposition?

25 ATTORNEY VITT: I think --

VOLUME: 7
PAGES: 222-431

1 ATTORNEY SCHROEDER: No. It's not even dated. This
2 is, this is -- I object to this whole line of inquiry, Judge.
3 He's been sitting on this. This is just par for the course in
4 this whole case, Judge, sitting on documents, not sharing them,
5 and then throwing them out at the last minute. This is not how
6 you instructed us to conduct ourselves, and we certainly didn't
7 act that way. And I haven't seen this document before. It
8 wasn't raised in her deposition. I don't know. It's not even
9 dated. So yeah.

10 ATTORNEY VITT: Well, actually, I didn't have it at
11 the time of the deposition. That, we got it --

12 ATTORNEY SCHROEDER: Are you representing that you
13 just got it?

14 ATTORNEY VITT: Define just.

15 ATTORNEY SCHROEDER: No. The deposition happened in
16 2019.

17 ATTORNEY VITT: Yeah.

18 ATTORNEY SCHROEDER: Okay. You haven't produced it
19 in this case, right?

20 ATTORNEY VITT: Well, by the time we got this, we
21 were already, this case was, I think, over and done, I mean,
22 including it went to the court of appeals. Just refreshing her
23 recollection. Go ahead.

24 THE COURT: As I recall, you were going to introduce
25 this to refresh Dr. Conroy's recollection, which means you will

VOLUME: 7
PAGES: 222-431

1 read from the document like you would from a deposition?

2 ATTORNEY VITT: I wouldn't be reading from the
3 document I would be presenting this to the Witness to see if it
4 refreshes her recollection.

5 THE COURT: And then removing the document, and it
6 wouldn't be in evidence?

7 ATTORNEY SCHROEDER: Understand, Judge, it hasn't
8 been shared at any point in this case. I haven't even looked
9 at it.

10 ATTORNEY COFFIN: The discovery has been closed for
11 years in this case due to the unusual procedural circumstances,
12 but this should have been produced to us. We've had repeated
13 nondisclosure issues.

14 ATTORNEY SCHROEDER: Judge. This isn't a letter from
15 2025 or 2024 or 2023. It's a letter from 2017.

16 THE COURT: Parties can refresh a witness's
17 recollection with any material.

18 ATTORNEY JONES: He's offering it just, he's offering
19 it solely for the purpose of determining, for seeing if it
20 refreshes her recollection. If it does, then he'll ask her
21 about her recollection. If it doesn't, he'll move on. But
22 this is not a responsive document to any discovery request.

23 ATTORNEY SCHROEDER: Why would he be asking questions
24 about it?

25 ATTORNEY COFFIN: He can't ask anything substantive

VOLUME: 7
PAGES: 222-431

1 about it if she remembers it or not, and it's hearsay issues,
2 and we still have this nondisclosure, anything substantive
3 about the letter.

4 ATTORNEY SCHROEDER: Judge, you asked us earlier
5 about the declaration of Dr. Russell and why it was on our
6 list. We put anything that could be possibly used on
7 impeachment on the list because we wanted to make sure, I
8 think, not to surprise anybody.

9 THE COURT: And the parties have generally been
10 complying with that particular directive, right, disclosing
11 everything that is used for impeachment. So this is not
12 disclosed, and I appreciate you're trying to use it to refresh
13 recollection, but it seems like it would be not in the spirit
14 of kind of the reciprocal disclosures you've all been making
15 until now. So I'm going to say you can't use it.

16 ATTORNEY VITT: All right.

17 (Bench conference ends.)

18 ATTORNEY VITT: No further questions, Judge.

19 THE COURT: Okay, thank you. Mr. Schroeder?

20 ATTORNEY SCHROEDER: No questions at this time, Your
21 Honor.

22 THE COURT: Okay. You may step down.

23

24 THE WITNESS: Thank you. What should I do with this?
25 (Indicating.)

VOLUME: 7
PAGES: 222-431

1 THE COURT: You can just leave that there. Mr. Vitt,
2 you have some exhibits up here if you'd like to take those.
3 Okay. Plaintiff may call the next witness.

4 IRA BERNSTEIN,
5 having been duly sworn to tell the truth,
6 testifies as follows:

7 THE COURT: Please go ahead.

8 DIRECT EXAMINATION BY ATTORNEY VITT

9 Q. Good afternoon, Dr. Bernstein.

10 A. Good afternoon.

11 Q. Would you provide us with a little background of what your
12 position is now and how long you've held that position?

13 A. Well, right now I am a professor and university scholar at
14 the Larner College of Medicine at the University of Vermont.

15 Up until June of last year, I was also the John Van Sicklen
16 Maeck chair of the department. So for 12 years I was the chair
17 of the department of OB/GYN and chief of the clinical service,
18 which is at the hospital. So the hospital has an affiliated
19 connection to the departments which are on the academic side.
20 So I ran the clinical service as well as the academic service.

21 Q. Do you know Dr. Misty Porter?

22 A. I do.

23 Q. How do you know her?

24 A. I think I first met her in 1989 when she began her
25 internship with us at the University of Vermont. I was a

VOLUME: 7
PAGES: 222-431

1 third-year fellow in maternal fetal medicine and joined the
2 faculty right after that. So, during the time of her residency
3 and then following that during her fellowship, we were, I was
4 her teacher and a colleague.

5 Q. All right. So you've worked closely with her for many
6 years?

7 A. Well, certainly, during the years of her residency, we
8 worked closely. During her fellowship, not as close, because
9 that was a subspecialty that I was not engaged in. But, for
10 the part of her residency, very close.

11 Q. How would you describe her performance as a resident?

12 A. She was a really good resident. She was quite skilled
13 surgically. She was committed to excellence, and I never had a
14 problem with her relative to the performance of her clinical
15 activities.

16 Q. Does she hold herself to high standards?

17 A. Very much so, yes, perhaps higher than some of her
18 colleagues and others, yes.

19 Q. All right. Has the University of Vermont had a
20 reproductive endocrinology division?

21 A. Yes, we have, yes.

22 Q. For how long?

23 A. So I don't know exactly when it started. The American
24 Board of OB/GYN recognized and identified reproductive
25 endocrinology as a subspecialty in 1972. I was a medical

VOLUME: 7
PAGES: 222-431

1 student at UVM from 1978 to 1983, and, during that time, I
2 rotated on the reproductive endocrine service. So I know that
3 in 1981 it existed. I don't know exactly between 1972 and 1981
4 when it started. And I know that their first fellow graduated
5 in 1984, so subspecialty trained in reproductive endocrinology
6 was 1984, and so the division had to have been present for
7 quite some time before that.

8 Q. Does a reproductive endocrinology division do things
9 besides IVF?

10 A. Yeah, absolutely. In fact, the American Board of OB/GYN
11 identifies a whole series of competencies and excellences that
12 are expected for those who train in reproductive endocrinology:
13 minimally invasive surgery and the care of gynecologic
14 complications and medical issues related to gynecology are
15 among those.

16 Q. Would it be accurate to say that IVF is a small portion of
17 what a reproductive endocrinology division does?

18 ATTORNEY McDONALD: Objection, Your Honor.

19 THE COURT: Basis?

20 ATTORNEY McDONALD: He doesn't have a foundation to
21 testify with regard to all REI divisions.

22 THE COURT: So I'll overrule the objection. The
23 Witness can answer if he knows.

24 THE WITNESS: So I will say it's highly variable,
25 frankly. In fact, there are some reproductive endocrine groups

VOLUME: 7
PAGES: 222-431

1 which are predominantly focused on IVF. Academic reproductive
2 endocrine groups tend to be less focused on IVF. So there is
3 often a broader spectrum of clinical care involved in academic
4 reproductive endocrine groups, but it varies tremendously,
5 frankly.

6 BY ATTORNEY VITT:

7 Q. So the group at University of Vermont is an academic
8 focused?

9 A. Yes, correct.

10 Q. And how about the reproductive endocrinology division at
11 Dartmouth-Hitchcock?

12 A. So, in its affiliation with Dartmouth and it's a
13 university hospital, I would consider it an academic center,
14 and I think they probably consider themselves an academic
15 center.

16 Q. Right. Do you recall hearing that Dartmouth-Hitchcock had
17 decided to close its REI division?

18 A. Yeah, I had it communicated to me through, electronically
19 through email, yes.

20 Q. Do you recall your reaction?

21 A. Well, I was surprised. It certainly was an unusual move
22 for an academic medical center to close a primary division
23 within its department of OB/GYN, so it surprised me.

24 Q. And do you recall hearing that Misty Porter's employment
25 had been terminated?

VOLUME: 7
PAGES: 222-431

1 A. I remember hearing that. Again, I can't tell you exactly
2 who I heard that from, but I knew that it was part of the
3 disbanding of the division at Dartmouth-Hitchcock.

4 Q. Was that a surprise to you?

5 A. It was a surprise to me. I knew her work, and I knew her
6 history and her commitment to Dartmouth-Hitchcock. So it
7 definitely was a surprise.

8 Q. Can you imagine the University of Vermont ever deciding to
9 close its REI division?

10 A. So I can imagine it, but I can't imagine planning it,
11 frankly. I mean, I think that, you know, there are a number of
12 primary divisions within the department of obstetrics and
13 gynecology that we are responsible to train our residents in,
14 and we have a fellowship to train fellows in that subspecialty.
15 And so in that, excuse me, in that context it's a primary
16 division, and things happen. People leave voluntarily, and
17 sometimes you go without certain kinds of providers for periods
18 of time, but as a chair it's hard for me to imagine
19 intentionally closing down a primary division.

20 Q. Have there been times when the University of Vermont
21 Medical Center has had, say, difficulty with having enough
22 nurses?

23 A. Yeah, absolutely.

24 Q. Tell me about it.

25 A. So our reproductive endocrine division is actually a

VOLUME: 7
PAGES: 222-431

1 really good example of that. When I first became chair in
2 2012, we had a group of reproductive endocrinologists who
3 elected to go into private practice in the community, and, when
4 they left to do predominantly IVF -- and so this was moving the
5 IVF facility out of our program -- they took with them our IVF
6 nurses and our IVF staff, and so we were left without an IVF
7 team, which, as I said, it's not exclusively the piece of
8 reproductive endocrinology that we manage, but it was, it's a
9 significant portion.

10 And so we had no IVF nurses and no IVF doctors. Actually,
11 we had one IVF doctor who shortly left after that. So we
12 needed to rebuild the program, but there was never a question
13 of us rebuilding the program. We were not going to abandon the
14 program.

15 Q. You managed to get the nurses hired and trained?

16 A. Yes, yes.

17 Q. Did Dartmouth-Hitchcock agree -- excuse me. Did
18 Dartmouth-Hitchcock make a request to UVM after the REI
19 division was closed?

20 A. Yes.

21 Q. Can you tell me about that?

22 A. Well, I'm confident that they recognized that the training
23 of their residents in reproductive endocrinology and fertility
24 was an important piece of their residency program, and they
25 also recognized that they had patients who needed care. So

1 there were two pieces to the requests that came forward. One
2 was how could we coordinate clinical care to best facilitate
3 the care of patients that were still in their region and then
4 how could we facilitate the training of their residents in some
5 way to allow them to have exposure to academic reproductive
6 endocrinology and fertility.

7 Q. So did you assist in the training of the residents?

8 A. Yes.

9 Q. Tell me how you did that.

10 A. The nature and structure of the residency programs are
11 such that residents rotate through different rotations and get
12 to see different pieces of the subspecialties of OB/GYN. At
13 the time, I think it was our third-year residents -- it might
14 have been second- or third-year residents -- were rotating
15 through our reproductive endocrine rotation, but they only use
16 six months to get their rotations completed. We have three
17 residents per year. They each do a two-month rotation.

18 So six months in that year, that same year that our
19 residents were rotating through, we had six months that were
20 uncovered and had the opportunity to continue to train
21 residents, in this case, the Dartmouth-Hitchcock residents,
22 during the other six months.

23 Q. And was there a doctor on your staff who ended up doing
24 most of that training?

25 A. I can't speak to that because I wasn't in the rooms at the

1 time, but I would say that we had a team of REI docs at that
2 time who were very active in the training and they, they owned
3 that training, both the division director and the members of
4 the division at that time.

5 Q. Was Dr. Porter one of those?

6 A. She sure was, yes.

7 Q. And did she take an active role in the training?

8 A. Yes, she did.

9 Q. These were the actual residents who had been at
10 Dartmouth-Hitchcock when she was there, except now she's
11 training them at UVM?

12 A. Well, for some window of time, that was true, and then,
13 obviously, three of them graduated, and new residents came
14 through.

15 Q. Can you tell me, please, the circumstances under which
16 Misty Porter came back to working at UVM?

17 A. Well, I think it started right around the time that --
18 first, the nurses left and created a vacuum for the service,
19 and then the division was disbanded. I think both Leslie
20 DeMars, who was the chair at the time, and Misty reached out to
21 us to try to facilitate the care of their patients, and we were
22 trying to figure out how could we accommodate Misty, so how
23 could we put her into our clinical schedule to let the patients
24 come up to Burlington to get the kind of care that they needed.

25 And that was a process that took some time. Both the

VOLUME: 7
PAGES: 222-431

1 residency training and the clinical affiliation took some time
2 to work through the details and figure out exactly how that was
3 going to work, and we went through several iterations of what
4 that might look like, both first an affiliation with Dartmouth
5 and then, after Misty formally left Dartmouth-Hitchcock, for
6 her to continue to provide care to some of those patients, as
7 well as the new patients.

8 Q. And did she come to work at a .8 FTE?

9 A. I can't say I remember exactly where she started, but, at
10 some point during her time with us, she either requested or
11 maybe even when we started she was working at a .8 FTE.

12 Q. And did that include covering call?

13 A. Yes, yes.

14 Q. Could you describe what's entailed in being available to
15 provide call services in an OB/GYN department?

16 A. So I think people typically think of OB/GYN department
17 call as delivering babies, which it is, but that's on the
18 obstetric side. On the gynecologic side, we have emergencies
19 that come through our emergency room every day: women who have
20 bleeding problems, abnormal pregnancies in very early pregnancy
21 that need acute care. And on the gynecology side that's very
22 common, and sometimes those women need some, need skilled
23 surgeons, and not all of our docs who are on call have those
24 skills. So we have a back-up system for providing those
25 skills.

VOLUME: 7
PAGES: 222-431

1 If we think about the reproductive endocrine group
2 specifically, they're managing medications and other kinds of
3 issues for their IVF patients but also complicated surgeries
4 and backup to the general gynecologists who are on.

5 Q. Is Misty one of the surgeons who could provide the
6 necessary surgical skills in the complicated cases?

7 A. Yeah, she's actually one of our most skilled surgeons.

8 Q. Could you elaborate a little bit about the types of
9 surgery she is trained to perform?

10 A. Yeah. I think, and, in fact, one of the board
11 expectations of those who train in reproductive endocrinology
12 and infertility is to be really good at what we call minimally
13 invasive surgery. That's the kind of surgery where you don't
14 make full incisions in people, but you make small incisions and
15 you work through a scope, and there are two primary ways that
16 we do that.

17 We do that with something called straight-stick
18 laparoscopy where you put in a telescope and you look through
19 it directly and you do surgery with other holes that have
20 instruments in them, and you do it robotically where you sit at
21 a console and all of the instruments are controlled remotely
22 with a robot. And Misty is very skilled at both the
23 straight-stick laparoscopy and the robotic surgery.

24 Q. Is that unusual, to have the skills to be able to do both
25 of those things with some measure of expertise?

1 A. Well, I mean, we have a number of providers who do that,
2 but it's not all the providers and not a majority of the
3 providers. So we probably have a handful of providers who have
4 that skill set.

5 Q. In terms of taking call for gynecological reasons, is it
6 necessary that the doctor be relatively close to the hospital
7 so that the doctor can get there quickly after getting the
8 call?

9 A. That may seem intuitive, but we certainly have people who
10 live all over the place, but we try to create a guideline that
11 you need to be able to be at the hospital within 30 minutes of
12 a call predominantly for surgical, urgent surgical cases, but
13 as well as for urgent obstetrical cases.

14 Q. So, for Misty to do it, she has to be, have a residence
15 somewhere in the Burlington area, right?

16 A. Well, she's got to be able to get to the hospital within
17 30 minutes. So, unless she's got a personal helicopter, I
18 think she's got to live pretty close.

19 Q. All right. I'd like to talk about Misty as a colleague.
20 You and she have worked together for number of years. What's
21 she like as a colleague?

22 A. Yeah, I think we touched on this earlier. I think she's
23 someone who has high expectations of herself for excellence and
24 high expectations of others and she likes to work in a
25 high-performing environment.

1 Q. What does that mean?

2 A. An environment that provides the highest level of clinical
3 care, that interacts efficiently to standard of care end
4 points.

5 Q. And have you found that she has been willing -- let me --
6 has she been willing to assist residents and nurses in
7 connection with training and getting them up to speed and
8 getting to be better?

9 A. Very much so, very much committed to supporting, you know,
10 and being available. We have, the nature of our academic
11 practice is we have new people coming in all the time, and
12 figuring out how to support those new people and learning how
13 to do surgery is a really important part. And, in fact, Misty
14 helped us create in our department a policy around bringing new
15 people in in her role for vice chair for education and academic
16 affairs and took the lead role in helping to bring people in
17 and train them.

18 Q. When you say she was vice chair, can you explain the scope
19 of her duties?

20 A. So our vice chair for education and academic affairs, the
21 primary responsibility is coordinating our retreat. We have an
22 annual retreat for education which focuses on all of the levels
23 of education involved in our department and includes medical
24 student education, resident education, and fellow education, as
25 well as education of our faculty, and we have a retreat each

1 year to do that.

2 She would schedule that retreat and coordinate it. We
3 also developed a program which I just mentioned which was, How
4 can we best help our new faculty to, first, to know that
5 they're up to speed in terms of their performance and then to
6 support them and help provide mentorship, and she helped to
7 create that program as well.

8 Q. The mentorship part, she's quite good at, is she?

9 A. Yeah, she was very good at it in our department, very
10 good.

11 Q. Would you say that it would be accurate to describe her as
12 a straight shooter?

13 A. Very much so.

14 ATTORNEY VITT: Excuse me a second. no further
15 questions, Judge.

16 THE COURT: Okay. Cross-examination?

17 CROSS-EXAMINATION BY ATTORNEY McDONALD

18 Q. Dr. Bernstein, how are you?

19 A. Good. Nice to meet you.

20 Q. Nice to meet you. My name is Morgan McDonald. First, I
21 just want to start by asking, did you review any documents in
22 preparation for your testimony today?

23 A. I did look back at some of my email exchanges around the
24 time of the events that led to our, this discussion. In other
25 words, when I first learned that the nurses, the first

VOLUME: 7
PAGES: 222-431

1 communication I had around when the nurses were no longer
2 available and then the first communication from Leslie DeMars
3 about re, what she described, I think, initially as
4 reorganization of the REI division.

5 Q. Did you review any materials that were prepared by counsel
6 for Dr. Porter?

7 A. No.

8 Q. I'm going to show you what's been admitted into evidence
9 as Exhibit C6A if I could just ask that to be pulled up,
10 please. I'm going to ask -- yes, Page 7. Thank you. I'll
11 just ask you to take look at that. First, well, I'll give you
12 a moment to review.

13 A. Yeah, I got it.

14 Q. Great. So this is a text that was sent on May 5th 2017
15 from Lisa McGee, and she says, "Hi Misty. I spoke to Ira this
16 morning and he agreed, if you want it, we can do a per diem
17 arrangement pretty quickly for June".

18 Fair to assume that you're the Ira in that text?

19 A. I am. I think so too.

20 Q. So would you agree with me that, as of May 5th, you had
21 agreed to offer Dr. Porter a job at UVM?

22 A. So per diem, I would -- the question of a job is a
23 different one. So a per diem agreement means that somebody can
24 come and work hours that aren't defined. We don't consider
25 that a formal position or a job, but that we consider it a

VOLUME: 7
PAGES: 222-431

1 opportunity. And I would say that this was very clearly in
2 follow-up to her and her, the chair of the department reaching
3 out to try to figure out how to provide continuity for the
4 patients who were not going to be able to be available at
5 Dartmouth-Hitchcock.

6 Q. And are you aware that the day before Dr. Porter had been
7 informed that her employment at Dartmouth-Hitchcock was being
8 terminated?

9 A. I don't think I knew that at the time.

10 Q. All right.

11 ATTORNEY VITT: Could you get closer to the
12 microphone? I'm sorry.

13 ATTORNEY McDONALD:

14 Q. Sorry. I'll direct your attention to the second-to-last
15 sentence there, "No strings attached for longer term so you
16 could still take the Boston option if it suits your needs
17 better".

18 So the reference to Boston option, would you agree with me
19 that it appears that Dr. Porter had other options as well?

20 A. Yeah, it looks like she was trying to figure out what she
21 was going to do next. And, in that same context, so the idea
22 that we were offering her a job wasn't exactly -- she was going
23 to look around, and we were going to try to give her a
24 temporary opportunity.

25 Q. Sure. Do you have a sense of what the Boston option

1 refers to?

2 A. I don't, actually.

3 Q. All right. And then I'll just ask you to take a look at
4 the next page, which is 8. We'll put it on the screen for you.
5 Sorry. That's not the correct page. I'll actually move on
6 from that one.

7 So you testified today that Dr. Porter joined UVM in less
8 than a full-time capacity. You're not sure if it's maybe .7 or
9 .8. Actually, let me rephrase.

10 You testified today that, at some point, Dr. Porter worked
11 in less than a full-time capacity; is that right?

12 A. We actually consider full-time at UVM .75 or more. So I
13 would consider it full-time at .8. They get full benefits, but
14 not a 1.0, if that's the question, yes.

15 Q. It is. Thank you. And are you aware that she worked at a
16 1.0 basis at Dartmouth-Hitchcock?

17 A. I did not know that. Yeah.

18 Q. And you testified today about Dr. Porter's call schedule
19 at UVM. You're not aware of what her call schedule looked like
20 at Dartmouth Health, correct?

21 A. Correct.

22 Q. You also testified today about a number of surgeries that
23 Dr. Porter is skilled in. You're also not aware that, about
24 whether anyone at Dartmouth Health could perform those kinds of
25 surgeries, are you?

VOLUME: 7
PAGES: 222-431

1 A. That's correct. I do not know.

2 Q. Are you eligible for a pension? Or, excuse me, were you
3 eligible for a pension during your time at UVM?

4 A. So there is no pension option at UVM. We have a 403(b)
5 contribution that's matched by the institution which is
6 independently supported. So there's no specific pension, no.

7 Q. Do you know whether Dr. Porter Would be eligible for that
8 program that you just described?

9 A. Yeah. So, after about six months of employment at the
10 university, there are matching plans that both the medical
11 center and the university offer based on your income, and it's,
12 it's varied depending on how long you work on the UVM, on the
13 hospital side, and it's 10 percent on the UVM side. And so
14 each of the employees -- it's complex because each of the
15 employees who works at the hospital actually has two paychecks,
16 a university paycheck which is part of the academic
17 appointment, and a hospital paycheck which covers their
18 clinical effort.

19 Q. Got you. Okay. Thank you. You testified today that,
20 from your perspective, Dr. Porter has high expectations of
21 herself and others. Would you say those expectation are higher
22 than most?

23 A. Yes. Higher than most, I would agree with that.

24 Q. Has Dr. Porter ever raised any concerns or complaints
25 about the processes and procedures at UVM?

VOLUME: 7
PAGES: 222-431

1 A. Yes.

2 Q. And what were the nature of those complaints?

3 A. I think she was concerned in our IVF program. When she
4 first joined, I think she was concerned about some of the
5 clinical decisions that were being made, and I think she didn't
6 always agree with them, and I think that she was concerned
7 about the process by which those decisions got made.

8 Q. And are you aware of any complaints or concerns from
9 Dr. Porter about her colleagues?

10 A. Yes.

11 Q. Can you describe the nature of those concerns or
12 complaints?

13 A. I don't know that I could give you details because it was
14 a while ago, but I think she was concerned about some of the
15 clinical decision making around her in the reproductive
16 endocrinology group.

17 Q. And how did she raise those concerns or complaints?

18 A. I think she raised them -- oh, so by hearsay I've heard
19 that she raised them in group meetings when she was meeting
20 with other team members in the IVF, and then she, I would have
21 meetings with her regularly as I did with all my faculty, and
22 he raised occasional concerns with me directly.

23 Q. During your time as chair, how many people reported
24 directly or indirectly to you?

25 A. Approximately okay?

1 Q. That's fine.

2 A. About ten.

3 Q. And would it be fair to say that each of them sort of had
4 a different method of practicing?

5 A. Yeah, absolutely.

6 Q. Because there's no really one way to practice medicine,
7 right? Everyone kind of has their own individual way of doing
8 things?

9 A. Yes, yes. So there are standards of care that are
10 well-established practice patterns that are consensus patterns
11 based on evidence, and so there are limits to the expectations
12 for care, but there is, within excepting those standards,
13 outside of those there's always variation in clinical care and
14 decision making, for sure.

15 Q. And it's fair to say that different physicians have
16 different strengths and weaknesses, correct?

17 A. Yes.

18 Q. And also that physicians sort of will progress in their
19 skills at different speeds, correct?

20 A. Absolutely.

21 Q. And you would agree with me as well, I think, that
22 there's, to build a successful team division in a hospital,
23 OB/GYN division, for example, there has to be a certain level
24 of communication between everyone on the team, correct?

25 A. Absolutely.

VOLUME: 7
PAGES: 222-431

1 Q. And everyone has to sort of listen to one another's ideas?

2 A. Yeah.

3 Q. And physicians have different ways of practicing, and they
4 would have to sort of listen to one another and understand that
5 there are differences in the way they practice, correct?

6 A. Yeah, but I think that, as long as those are within
7 reasonable standards of care, that -- again, I haven't
8 practiced clinical medicine for a little while, but, when I was
9 doing it, it was very common to have a lack of consensus
10 necessarily for some issues, and you allow the person who's in
11 charge at that day to make that final decision.

12 Q. I'm sorry. Your testimony was that the person who is in
13 charge would be the one that would make the final decision on
14 that?

15 A. Yeah. I mean, we try to segregate responsibilities so
16 that one person is in a decision-making capacity at any given
17 point in time in a given environment, and you try to encourage
18 them to do what you think is right, and you have legitimate
19 academic arguments, and then that person ultimately decides.

20 Q. And so is it fair to say that a division, in order to be a
21 successful division, a division would have to have a general
22 willingness to communicate among everyone that's within the
23 division?

24 A. Yes.

25 Q. Switching gears a little bit, are you aware of any recent

VOLUME: 7
PAGES: 222-431

1 division or program closures at UVM?

2 A. Well, not in OB/GYN, but I know that, in response to the
3 Green Mountain Care board, there was some changes
4 institutionally. I don't really know the details of what was
5 closed. I think the renal support, some of the renal support
6 was closed as an institutional decision. I don't really
7 remember. I think transplant may have been closed as a result
8 of some cost-cutting measures, couple of cost-control measures.
9 So, yeah, I am definitely aware that there are things that do
10 change over time.

11 Q. And would, is, decision to close those, I think you said
12 was subsequent to your retirement; is that right?

13 A. Yes, it was after I stepped down. My understanding is
14 that they were fiscally based. They were financially based on
15 the Green Mountain Care Board decision.

16 Q. Okay. So it's fair to say that there are instances in
17 which hospitals will close divisions for reasons including
18 perhaps financial decisions and that those are difficult
19 decisions that have to be made?

20 A. Absolutely, yes.

21 ATTORNEY McDONALD: Thank you. I have nothing
22 further.

23 THE COURT: Okay. Any redirect?

24 ATTORNEY VITT: No, Your Honor.

25 THE COURT: Okay. Thank you, Dr. Bernstein. You may

VOLUME: 7
PAGES: 222-431

1 Step down.

2 ATTORNEY VITT: I'm sorry.

3 THE COURT: Mr. Vitt?

4 ATTORNEY VITT: I think we have gone through all our
5 witnesses for the moment. If Your Honor would be inclined to
6 call it a day, that would be great.

7 THE COURT: Okay. I don't think there will be
8 protest from the jury. Okay. So it's almost 4:20. You're
9 going to break ten minutes early today. As usual, please do
10 not talk to anyone about the case or to one another or do any
11 independent research on your own about the case. Have a good
12 evening.

13 (The Jury leaves the courtroom.)

14 THE COURT: Okay. Mr. Jones, I feel like, at this
15 time of day, you and I are the ones who end up talking about
16 scheduling.

17 ATTORNEY JONES: We do. Tomorrow morning we will be
18 calling Dr. Ed Merrens, who I believe is the final witness of
19 our case in chief.

20 THE COURT: Okay.

21 ATTORNEY JONES: I predict we'll be done by lunch,
22 but, I mean, I think cross-examination, if any, would
23 contribute to that estimate.

24 THE COURT: Okay, all right. So then the plaintiff
25 anticipates resting tomorrow, and then defense case?

1 ATTORNEY SCHROEDER: Well, before that, Your Honor,
2 we might move for directed verdict, so I'm sure you anticipated
3 that I might say that. And we'll be ready to go right after
4 that, and I've already communicated earlier that, more likely,
5 the first three witnesses, not sure of the order yet, but Judy
6 Stern, Katy Mansfield, and Kelly Mousley, and I suspect --
7 well, not only do I suspect, I'm fairly confident we'll be able
8 to finish them by the end of the day.

9 THE COURT: Okay, all right. I had mentioned a
10 couple of days ago about getting together and talking about
11 whether aspects of the jury instructions, if there's any
12 aspects of that that you're in agreement on. As I'm working
13 through these instructions, as you can imagine, you've
14 generated proposed instructions. Even some of the more kind of
15 what I'll call simpler elements can be a little somewhat
16 involved.

17 So, if there are agreements, I'm thinking in particular
18 about whether Dartmouth is an employer subject to the ADA, for
19 example; whether Dr. Porter had a disability within the meaning
20 of the ADA, just putting these out there. And, also, the
21 question of otherwise qualified to perform the essential
22 functions of a job, if that's something that the parties may be
23 in agreement on, or any other things. I raised it a couple of
24 days ago. I think now I should put a finer point on it.

25 How about, by this time tomorrow, let's figure out if

VOLUME: 7
PAGES: 222-431

1 there is anything that you can agree to with respect to these
2 instructions. Is that reasonable?

3 ATTORNEY SCHROEDER: I think that's reasonable, Your
4 Honor. I do know that we expect to supplement this week to
5 you. And so I think tomorrow is Wednesday. I think, by the
6 end of the day, we'll be able to figure out which ones we are,
7 the simpler ones that I think we can get to. But I certainly
8 expect that by Thursday to get some additional supplemental
9 jury instructions for opposing counsel to consider as well --

10 THE COURT: Okay.

11 ATTORNEY SCHROEDER: -- to supplement it. Because I
12 do think there they may be a robust set of jury instructions
13 that you end up having at the end of the day. Just, there are
14 six claims in the case, and there's a number of theories that
15 are bandying about. So I think, by Thursday afternoon, we
16 would expect to get them to you if that's acceptable to the
17 Court.

18 THE COURT: Okay. So I know your case hasn't started
19 yet, but, in terms of -- do you know the number of witnesses at
20 this time, just to give us a little preview in terms of how far
21 we anticipate going into next week? And I only ask that
22 because, at some point, obviously, we're going to need to have
23 a charge conference, and, assuming -- I know you're making a
24 motion tomorrow, but, assuming we move forward, to discuss
25 those jury charges.

VOLUME: 7
PAGES: 222-431

1 So I just wanted to make sure that I'm giving counsel
2 enough time to take a look at what the Court has generated so
3 we can have kind of a meaningful charge conference.

4 ATTORNEY SCHROEDER: I think I appreciate, Your
5 Honor. I think that, at this point, the likelihood of us
6 resting on Monday is fairly high.

7 THE COURT: Okay.

8 ATTORNEY SCHROEDER: And I would hope -- the hope was
9 to get to you by Thursday our supplemental jury instructions so
10 that, to the extent that you wanted us to look at anything over
11 the weekend, we will hopefully be close to wrapping up, and
12 then on Monday one or two witnesses and then, obviously,
13 closings and dealing with those issues. But I certainly
14 expected that we would be in a position, both sides, to review
15 a number of these issues over the weekend to the extent that
16 you had anything you wanted us to review for the charge
17 conference in addition to preparing closing statements. So
18 that maybe that would slide into Tuesday morning, but I don't
19 know. I'm pretty optimistic that we can move things along and
20 be done with our case in chief by Monday afternoon.

21 THE COURT: Monday afternoon? Okay, all right.

22 ATTORNEY SCHROEDER: If not sooner.

23 THE COURT: So, if you finish it, say, Monday
24 morning, then it's possible we could go into closings Monday
25 afternoon?

VOLUME: 7
PAGES: 222-431

1 ATTORNEY SCHROEDER: I think by Friday we'll know
2 whether or not we, whether or not that's likely, Your Honor. I
3 think we've got -- I've already shared with opposing counsel
4 days ago witnesses we were taking off our witness list. We are
5 calling, we are going to call back, just for the Court's own
6 knowledge, and we've already shared it with opposing counsel,
7 we are going to call back Dr. Merrens. We expect to call back
8 Dr. Padin. We have, besides the three tomorrow, I think, four
9 other witnesses, but I think, realistically, I think Monday,
10 close of all evidence on Monday at some point is, is a good
11 estimate right now.

12 THE COURT: Okay. In light of that, then, it's
13 possible that it sounds like we would have to have the charge
14 conference this week.

15 ATTORNEY SCHROEDER: We're at the pleasure of the
16 Court.

17 THE COURT: Right. Just, again, trying to kind of
18 map it out here so that we have enough time to finish it on my
19 end. And, also, you're telling me that you're going to be
20 giving me more robust proposed instructions by the end of the
21 day Thursday. That's really not going leave tons of time.

22 ATTORNEY SCHROEDER: I will verify where we are on
23 that tonight.

24 THE COURT: Okay.

25 ATTORNEY SCHROEDER: Your Honor, I'll try to get them

VOLUME: 7
PAGES: 222-431

1 to you as quickly as possible, but I wanted to at least have a
2 little bit of a buffer to the extent that we will, that you
3 need us to have a discussion perhaps late Friday if we need to
4 stay after or early Monday morning.

5 I'm at the Court's mercy on when to have the charge
6 conference, and if it might be that we could finish evidence
7 midday Monday, perhaps have the charge conference in the
8 afternoon, and do closings Tuesday morning? That's just an
9 idea. I'm not, I haven't really put a lot of thought into it,
10 but I understand your point of wanting to make sure we have a
11 robust charge conference and having the parties have the
12 ability to discuss it with you.

13 THE COURT: Right, okay. Well, thank you for that,
14 and I know you can't predict this with scientific precision.
15 The idea of perhaps, if evidence closes on Monday, you know,
16 halfway through the day, early afternoon, since we are ahead of
17 the anticipated schedule, then we can have a conversation about
18 closings on Tuesday morning, in which case then it seems like
19 we might be able to do a charge conference on Monday at some
20 point. So okay. Anything from plaintiff?

21 ATTORNEY JONES: Well, no. I think this is the first
22 I've heard about potential supplemental instructions. I just
23 would like to make sure we have enough time to digest and react
24 to it.

25 THE COURT: Yeah.

VOLUME: 7
PAGES: 222-431

1 ATTORNEY JONES: Other than that, I'm, with regard to
2 scheduling, there's the potential for a rebuttal case. If it
3 happened, it would be probably brief, but I just want to make
4 sure that we also keep some room for that potential.

5 THE COURT: Yeah. No. Thank you for bringing that
6 up. We didn't discuss that. So that might add more time.
7 Okay, all right. I think we've done enough on that topic for
8 today. All right. If there's nothing else, then have a good
9 evening, and see you at 9:00 tomorrow.

10 (Whereupon at 4:28 p.m. the hearing was adjourned.)

11 C E R T I F I C A T E

12 I, Sunnie Donath, RMR, Official Court Reporter
13 for the United States District Court, District of Vermont, do
14 hereby certify that the foregoing pages are a true and accurate
15 transcription of my stenographic notes of the hearing taken
16 before me in the above-titled matter on April 1, 2025 to the
17 best of my skill and ability.

18

19

20

Sunnie Donath, RMR

22

Sunnie Donath, RMR

23

24

25